166-463

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 226.

THE WASHINGTON NATIONAL BANK OF SEATTLE, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF KING, IN THE STATE OF WASHINGTON, AND A. P. MITTEN, AS TREASURER AND EX OFFICIO TAX-COLLECTOR OF SAID COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED FEBRUARY 14, 1895.

(15,792.)

6. That the federal constitution has not been violated by the taxing officers of the state, and no right claimed thereunder has been denied by the Washington courts.

7. That the complaint does not show that before the commencement of this action the plaintiff had availed itself of the tribunals provided by the laws of the state to obtain a proper review of the assessment upon its shares.

Respectfully submitted, JOHN B. ALLEN,
JOHN K. BROWN,
E. B. TITTON,
Counsel for Defendants in Error.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 7, 1896.

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a THE WASHINGTON NATIONAL BANK OF SEATTLE, Plaintiff and Appellant,
—
THE COUNTY OF KING *et als.*, Defendants and Respondents. } No. 12878.

Appeal from the superior court of King county to the supreme court of the State of Washington.

1 In the Superior Court of the County of King, State of Washington.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Plaintiff,
vs.
THE COUNTY OF KING, in the State of Washington, and Byron Phelps, as Treasurer and *ex Officio* Collector of Taxes for said County, Defendants. } No. 12878. Complaint.

To the Honorable I. J. Lichtenberg, one of the judges of the above-entitled court:

The Washington National Bank of Seattle, a banking corporation created and doing business at the city of Seattle, in the county of King, State of Washington, under and by virtue of the national banking acts of the United States of America, brings this its complaint against the county of King, in the State of Washington, and against Byron Phelps, as treasurer and *ex officio* tax-collector of the county of King aforesaid, the said Byron Phelps being a resident of the county of King, in said State, and a citizen of said State, and thereupon plaintiff complains of the defendants and says:

I.

That at all times hereinafter referred to complainant was a corporation created and doing a banking business as a national bank under the national banking laws of the United States of America and located at the city of Seattle, in the county of King, State of Washington.

II.

2 That at all times hereinafter mentioned and prior thereto the defendant Byron Phelps was and he now is the duly elected and qualified treasurer of the county of King aforesaid and *ex officio* collector of delinquent taxes in and for said county.

III.

That the stock of complainant consists of 1,000 shares of $100.00 each; that all of the same is fully subscribed and paid in and is owned in part by citizens of the State of Washington resident in the State of Washington, and in part by citizens of the United States residing outside of the State of Washington.

IV.

That on and prior to the first day of April, 1891, one Frank Paul was the duly elected and qualified assessor of the said King county, and by virtue of his office was charged by the provisions of the act of the legislature of the State of Washington approved March 9, 1891, and entitled "An act to provide for the assessment and collection of taxes in the State of Washington and declaring an emergency," which said act went into effect on the day of its approval, with the duty of preparing an assessment-roll of all property subject to taxation in the county of King, as owned and there subject to taxation on the first day of April, 1891.

V.

That the said assessor thereupon proceeded to make out an assessment-roll for said county, wherein, *inter alia*, he did list to complainant as owner thereof 1,000 shares of complainant's capital stock, valuing the same for the purposes of assessment and
3 taxation thereunder at the rate of $110.00 per share, and did list the same *in solido* to complainant as owner thereof at a total valuation of $110,000.00.

VI.

That on the first Monday in August, 1891, as required by said statute, the said assessor did return the said assessment-roll to the auditor of the county of King, and thereafter, to wit, in the month of August, 1891, the board of county commissioners of said King county, acting as a board of county equalization, and being vested with power under the statute aforesaid as such board to correct and equalize the assessment of property for taxation in their county, did, by resolution, duly entered, reduce said valuation returned as aforesaid by said assessor of the capital stock of the complainant to the sum of $93.50 per share, making a total reduction of $16,500.00 therein.

VII.

That thereafter, in the month of November, 1891, the State board of equalization, having previously acted in the matter of equalization of taxes throughout the State, and having previously declared the rate of levy throughout the State for taxation for State purposes, the board of county commissioners of said King county, being charged by said statute by virtue of their office as such commissioners with the duty so to do, did, by resolution, levy a tax upon the several properties listed in said assessment-roll to the respective owners thereof as so listed, including complainant, at the rate
4 of thirteen mills on each dollar of valuation as fixed in said roll as equalized, said levy being for State, county, school, and road purposes.

VIII.

That thereafter, in the month of November, 1891, the auditor of said King county, having extended said tax levy upon said assess-

ment-roll, did deliver the said assessment-roll to the defendant Byron Phelps, as treasurer of said King county, together with his, said auditor's, warrant, commanding the said treasurer to collect from the persons, firms, and corporations therein assessed, including complainant, the tax therein respectively assessed to such person, firm, or corporation, thereby including in said command the tax so as aforesaid assessed to complainant upon the said 1,000 shares of its capital stock, which said tax then amounted to the sum of $1,224.85, principal.

IX.

That thereafter, the said tax so as aforesaid assessed to complainant not having been paid in whole nor in part, the defendant, the said County Treasurer, did, on the first day of March, 1892, declare the same delinquent, and did thereupon add thereto a penalty in a sum equal to ten per cent. thereof, to wit, the sum of $122.48, and is now most wrongfully proceeding to collect the said tax of and from complainant in the sum total of $1,347.33, exclusive of interest and costs, and threatens to collect the same and the whole thereof of and from the complainant by distraining sufficient property, goods, and chattels of the complainant wherewith to make the same, and, unless restrained by order of this court, will, most wrongfully and unlawfully, by force of his official power, collect the said tax and the whole thereof from the complainant by levying upon its goods and chattels and thereby seriously injuring complainant's business and interfering with the banking business of complainant, to the great detriment of complainant, its stockholders and depositors, and thereby violating and setting at naught the provisions of the Revised Statutes of the United States under which complainant was created and has its corporate existence and from whence complainant derives its power to conduct business as a national bank.

X.

That said assessment is an assessment *in solido* directly to the complainant, and said tax is levied upon and directly against the complainant, and because so assessed and levied is in direct contravention and violation of and is forbidden by the provisions of sections 5214 and 5219 of the Revised Statutes of the United States and generally of the banking acts and laws of the United States.

XI.

That by the provisions of the act of the legislature of the State of Washington hereinbefore by its title referred to the shares of stock held by the shareholders of the complainant are not taxable, but are exempted from taxation.

XII.

That on the first day of April, 1891, there existed in the county of King, State of Washington, taxable moneyed capital (other than and beyond that invested in shares of stock of national banks and

beyond that invested in incorporated banks) owned by citi-
6 zens of said State resident in said county and there invested in interest-bearing loans, discounts, and securities to them payable and owing by other citizens of said State residing in said county, of vast amount, to wit, exceeding the sum of six million dollars.

XIII.

That on said first day of April there existed in the State of Washington in counties other than the county of King aforesaid other taxable moneyed capital (aside from the moneyed capital referred to in the paragraph immediately preceding and aside from capital invested in incorporated banks) owned by citizens of the State of Washington resident in said State (in counties other than the county of King) and there invested in interest-bearing loans, discounts, and securities to them payable and owing by other resident citizens of said State in counties other than the county of King, of vast amount, to wit, exceeding the sum, as complainant is informed and believes, of twenty million dollars.

XIV.

That on the said first day of April the total capitalization of national banks located in the State of Washington was the sum of seven million dollars; that the total capitalization of banks there located, but incorporated under the laws of the State of Washington, was the sum of four million dollars, and that at the same time large amounts of moneyed capital were invested in the State of Washington by residents of said State in the stocks and bonds of insurance,
wharf, and gas companies, and in addition to the foregoing
7 there then existed in said State other moneyed capital amounting to at least twenty-six million dollars, being the other moneyed capital hereinbefore referred to; that in no case, as complainant is informed and believes, is the stock of any national bank or of shares of stock of any national bank located in the State of Washington valued for assessment at a less sum or assessed upon a valuation of less than 85 per cent. of the par value thereof; and, further, that the total assessment and total valuation in the assessments throughout the State of Washington for the year 1891 of and upon the bonds and shares of banks, banking corporations, insurance, gas, and wharf corporations was the sum of eight million two hundred and five thousand five hundred and three dollars.

XV.

That the facts alleged in the preceding paragraphs hereof numbered XII, XIII, and XIV were then and during all of the times intervening between the first day of April, 1891, and the time of the return of the several assessment-rolls throughout the State of Washington by the county assessors to the county auditors well known to the assessor of the county of King and all other county assessors throughout the State of Washington, and during all of said times and until the first day of March, 1892, were well known to the sev-

eral county and State officers hereinbefore referred to, and also to the boards of equalization and boards of county commissioners and the auditor of each of the counties in said State, and since the said first day of March, 1892, have been and now are well known to the defendant, the Treasurer of King County.

8 XVI.

That on said first day of April, 1891, the entire capital, surplus, and undivided profits of complainant were invested as follows, to wit, $25,000.00 in bonds of the United States and the remainder in loans to residents of the State of Washington.

XVII.

That all of said other moneyed capital referred to in the foregoing paragraphs hereof numbered XII and XIII, the same being all the moneyed capital in the State owned by resident individual citizens and invested, as aforesaid, in interest-bearing loans, discounts, and securities, except that owned by and invested in incorporated banks and located in the State, was purposely omitted from assessment and from taxation whatsoever by each and every of the county assessors and other taxing officers throughout the State of Washington, and the same and the whole thereof has escaped taxation throughout the State of Washington.

XVIII.

That the omission by said several county assessors and taxing officers of the several counties in said State to either assess or tax said other moneyed capital last above referred to was made through, under, and by reason and in pursuance of an agreement entered into in the year 1891, prior to the first day of April of said year, between the several county assessors of the several counties in said State, whereby it was agreed upon between them that such omission should be made by them and all of them, and said omission and agreement to omit was in pursuance of an opinion rendered by
9 the attorney general of the State of Washington to the said several county assessors at their request advising such omission, the said attorney general being, by virtue of his office, required by the laws of the State of Washington to render such opinion to said assessors upon request.

XIX.

That such omission necessarily operated as a discrimination in favor of other moneyed capital in the hands of individual citizens of said State and against shares of stock of national banking associations located within said State, including complainant, and necessarily resulted in the taxation of the shares of such national banks, including complainant, at a greater rate than other moneyed capital in the hands of the individual citizens of said State, all of which was well known to and most wrongfully intended by said several county

assessors and taxing officers, and all of which is in direct violation of and forbidden by the provisions of the Revised Statutes of the United States hereinabove specifically referred to.

XX.

That for the several reasons aforesaid the said tax assessed to the complainant is inequitable, illegal, and void, whether the same be an assessment *in solido* to complainant or an assessment upon its shares of stock to the individual owners thereof, and the aforesaid attempted and threatened proceeding to collect the same from the complainant on the part of the defendant, the said County Treasurer, is unjust and oppressive and should be restrained.

Wherefore to the end that the complainant may obtain the
10 relief to which it is justly entitled in the premises, it now prays the court that upon the hearing and determination of the matters herein involved it may be decreed by this court that said assessment to complainant is illegal and said tax upon the complainant, particularly described and referred to in its foregoing bill of complaint is void, and, further, that by order of this court a permanent injunction may issue restraining and enjoining the defendants and each of them from further in any way proceeding in the collection of said tax. Complainant further prays that pending the final hearing of this cause upon its merits a temporary restraining order be issued by the court restraining the collection of the tax to complainant hereinbefore referred to and described or any part thereof during the time which shall intervene between the filing of this bill of complaint and the final decree in this action, and complainant prays for such other and further relief as in equity it is entitled to receive.

THE WASHINGTON NATIONAL BANK,
By PRESTON, CARR & PRESTON AND
JAMES B. HOWE, *Its Solicitors.*

11 STATE OF WASHINGTON, }
County of King, } ss:

E. O. Graves, being first duly sworn, on oath says that he is the president of the plaintiff in the above-entitled action; that he has heard the foregoing complaint read, knows the contents thereof, and believes the same to be true; that he makes this affidavit on behalf of the plaintiff.

E. O. GRAVES.

Subscribed and sworn to before me this 8th day of March, 1892.

HAROLD PRESTON,
Notary Public, Residing at Seattle, Washington.

(Endorsed:) Filed Mar. 10, 1892. W. B. Spencer, clerk, by Geo. F. Stanley, deputy.

12 In the Superior Court of the State of Washington for King County.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Plaintiff,
vs.
THE COUNTY OF KING, in the State of Washington, and Byron Phelps, as Treasurer of and *ex Officio* Collector of Taxes for said County, Defendants.
} No. 12878. Demurrer.

Comes now the defendants in the above-entitled cause and demurs to the complaint filed herein, and for ground of demurrer say:

That said complaint does not state facts sufficient to constitute a cause of action.

Wherefore these defendants pray that said cause be dismissed, the preliminary injunction heretofore granted by this court be dissolved, and that they have and recover their costs and disbursements in their behalf sustained.

JOHN F. MILLER,
Attorney for Defendants.

Copy of the above and foregoing demurrer received and service accepted this 18th day of March, 1893.

PRESTON, CARR & PRESTON AND
J. B. HOWE, *Attorneys for Plaintiff.*

(Endorsed:) Filed March 18th, 1893. T. W. Gordon, clerk, by T. J. Quigley, deputy.

13 In the Superior Court of the State of Washington for the County of King.

WASHINGTON NATIONAL BANK OF SEATTLE
vs.
COUNTY OF KING *et al.*
} No. 12878. Demurrer Sustained.

SATURDAY, *May* 20, 1893.

In this action the demurrer of defendants to complaint is sustained; to which an exception is taken and the same is allowed.

J. W. LANGLEY, *Judge.*

48–360.

14 In the Superior Court of the State of Washington for the County of King.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Plaintiff,
vs.
THE COUNTY OF KING and BYRON PHELPS, as Treasurer and *ex Officio* Collector of Taxes for said County, Defendants.
} No. 12878. Decree.

MONDAY, *June* 12, 1893.

The defendants having heretofore by leave of court withdrawn their answer and interposed a general demurrer to the complaint in this action, which said demurrer, having been heard, has been heretofore by the court sustained, the plaintiff preserving due exception to the order of the court sustaining the same, and now, on this day, this cause again coming on for hearing before the court, the plaintiff appearing by Harold Preston and James B. Howe, its attorneys, and the defendants appearing by John F. Miller, prosecuting attorney for the county of King, and the plaintiff announcing in open court its election to stand upon its complaint:

Now, upon motion of the defendants, it is by the court adjudged and decreed that the action be dismissed, and that the defendants, because of the insufficiency of the complaint and because of the plaintiff's refusal to plead further, do have and recover from the plaintiff their costs in this action, to be taxed.

To the rendition of the foregoing judgment and the whole thereof the plaintiff at the time preserved due exception, which is allowed by the court.

Done this 12th day of June, A. D. 1893.

J. W. LANGLEY, *Judge.*

15 In the Superior Court of the State of Washington for the County of King.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Plaintiff,
vs.
THE COUNTY OF KING and BYRON PHELPS, Treasurer and *ex Officio* Tax-collector of said County, Defendants.
} No. 12878.

MONDAY, *June* 12, 1893.

Now, at the time judgment is rendered in the above-entitled cause, the plaintiff, by its attorneys, in open court gives notice that it appeals to the supreme court of the State of Washington from the judgment heretofore rendered in this action on this day by the above-entitled court dismissing the action, and for costs to the defendants, and from the whole of said judgment.

Whereupon, the said notice of appeal having, as aforesaid, been duly given in open court on this day, at the time of the rendition

of said judgment, it is by the court ordered that the clerk of the court do make entry of such notice of appeal in the journal of the court.

Done this 12th day of June, A. D. 1893.

J. W. LANGLEY, *Judge.*

16 In the Superior Court of the State of Washington for the County of King.

THURSDAY, *June* 15, 1893.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Plaintiff,
vs.
THE COUNTY OF KING and BYRON PHELPS, Treasurer and *ex Officio* Tax-collector of said County, Defendants.

No. 12878. Appeal and Stay Bond.

Know all men by these presents that we, The Washington National Bank of Seattle, the plaintiff above named, as principal, and M. F. Backus and Edward O. Graves, as sureties, are held and firmly bound unto the above-named defendants and each of them in the full sum of twenty-five hundred dollars ($2,500.00); payment of which, well and truly to be made, to the above-named defendants we and each of us bind ourselves, and we, the said sureties, bind our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of June, A. D. 1893.

The condition of the foregoing obligation is such that whereas the above-named principal has taken an appeal to the supreme court of the State of Washington from the judgment of the above-entitled court in the above-entitled action dismissing the action and for costs to the defendants;

And whereas at the time of the rendition of said judgment a temporary injunction was in force by order of the court restraining the defendants and each of them from proceeding to collect the
17 tax described in the plaintiff's complaint or any part thereof from the plaintiff:

Now, if the said plaintiff shall well and truly pay all costs and shall save the above-named defendants harmless from all damages by reason of the appeal, and shall pay all costs and damages that may be awarded against it, the plaintiff above named, on such appeal or on the dismissal thereof, and if the said plaintiff, the appellant, shall satisfy and perform the judgment appealed from in case it shall be affirmed, and any judgment or order which the said supreme court or any appellate court may render or make or order to be rendered or made by said superior court, and if the said plaintiff, appellant, shall pay to the said defendants all costs and damages that may be adjudged against the said plaintiff, appellant, on the said appeal, and all costs and damages that may accrue to the said defendants by reason of such injunction remain-

ing in force, then this obligation shall be void; otherwise to remain in full force and effect.

THE WASHINGTON NATIONAL
BANK OF SEATTLE,
By M. F. BACKUS, *Its Cashier.*

[Corp. Seal of W. N. B.]

M. F. BACKUS. [SEAL.]
EDWARD O. GRAVES. [SEAL.]

Signed, sealed, and delivered in the presence of—
W. THAANUM.
W. R. BELL.

18 STATE OF WASHINGTON, }
County of King, } ss:

M. F. Backus and Edward O. Graves, the sureties on the above and foregoing bond, being first duly sworn, each for himself on his oath deposes and says: I am one of the sureties named in the above and foregoing bond. I am not an attorney or counsellor at law, sheriff, clerk, or other officer of any court of record, and am worth the sum of twenty-five hundred dollars, over and above all my just debts and liabilities, in property within the State of Washington and exclusive of property exempt from execution. I am a resident of the State of Washington.

M. F. BACKUS.
EDWARD O. GRAVES.

Sworn to before me and subscribed in my presence this 12th day of June, A. D. 1893.

[NOTARIAL SEAL.] W. R. BELL,
Notary Public in and for the State of Washington,
Residing at the City of Seattle, said State.

(Endorsed:) Filed June 15, 1893. T. W. Gordon, clerk, by H. H. Smith, deputy.

19 In the Superior Court of the State of Washington for the County of King.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Plaintiff,
vs.
THE COUNTY OF KING and BYRON PHELPS, as Treasurer and *ex Officio* Collector of Taxes for said County, Defendants.
No. 12878. Statement of Facts.

Be it remembered that the following is a complete statement of all the facts in the above-entitled cause: The defendants having by leave of court withdrawn their answer and filed a general demurrer to the complaint, which, upon argument, was sustained, the plain-

tiff elected to stand upon its complaint, and thereupon the court rendered judgment dismissing the action and for costs to the defendants.

Certificate of Judge.

I, J. W. Langley, do hereby certify that the above-entitled cause was tried before me as above recited and judgment rendered therein by me as above recited, and that the matters and proceedings embodied in the foregoing statement are matters and proceedings in the said cause, and the same are hereby made a part of the record therein, and the said statement contains all the material facts, matters, and proceedings heretofore occurring in the cause and not already a part of the record therein.

In witness whereof I have hereunto set my hand, at the county of King, State of Washington, this 12th day of June, 1893.

J. *B.* LANGLEY, *Judge.*

20 The defendants in the above-entitled cause, by their attorney, hereby acknowledge, this 12th day of June, 1893, to have been duly served by the plaintiff with a copy of the foregoing statement of facts.

We hereby agree that said statement of facts is correct in all respects, and hereby notify the plaintiff that we will not propose any amendments thereto.

JOHN F. MILLER,
Attorney for the Defendants.

It is hereby stipulated between the plaintiff and the defendants, by their respective counsel, that application may be made to the judge of the court before whom the above-entitled cause was tried, to wit, the Honorable J. W. Langley, at his court-room, in the city of Seattle, on the 12th day of June, 1893, to settle and certify the foregoing statement of facts, and that at such time and place the judge may settle and certify the same, and that neither party will ever object or take exception to the statement in any respect because of its having been settled and certified upon this stipulation instead of upon notice.

E. M. CARR, JAMES B. HOWE AND HAROLD PRESTON,
Attorneys for the Plaintiff.
JOHN F. MILLER,
Attorneys for the Defendants.

(Endorsed:) Filed Jun- 15, 1893. T. W. Gordon, clerk, by H. H. Smith, deputy.

21 STATE OF WASHINGTON, } ss:
County of King, }

I, T. W. Gordon, county clerk of King county and *ex officio* clerk of the superior court of the State of Washington for the county of King, do hereby certify that the foregoing is a full, true, and cor-

rect transcript of so much of the record in said action No. 12878 as I am required to transmit to the supreme court on appeal, together with the original statement of facts therein.

I further certify that this record has been held in my office until this time on account of the sickness and absence of Mr. Harold Preston, one of counsel for the appellant, who had sole charge of said matter, it being his desire to examine said record before its transmission to the supreme court.

In testimony whereof I have hereunto set my hand and the seal of said court this 30th day of March, A. D. 1894.

[Seal of Superior Court of King County.]

T. W. GORDON, *Clerk.*

(Endorsed:) 1280. Filed Apr. 3, 1894. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

22 THE WASHINGTON NATIONAL BANK OF SEATTLE, Appellant,
v.
THE COUNTY OF KING and BYRON PHELPS, County Treasurer and *ex Officio* Tax-collector of said County, Respondents. } No. 1280.

THE COMMERCIAL NATIONAL BANK OF SEATTLE, Appellant,
v.
THE COUNTY OF KING and BYRON PHELPS, County Treasurer and *ex Officio* Tax-collector of said County, Respondents. } No. 1281.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Appellant,
v.
THE CITY OF SEATTLE and ADOLPH KRUG, Tax-collector of said City, Respondents. } No. 1282.

THE COMMERCIAL NATIONAL BANK OF SEATTLE, Appellant,
v.
THE CITY OF SEATTLE and ADOLPH KRUG, Tax-collector of said City, Respondents. } No. 1283.

THE FIRST NATIONAL BANK OF SEATTLE, Appellant,
v.
THE CITY OF SEATTLE and ADOLPH KRUG, Tax-collector of said City, Respondents. } No. 1284.

Consolidated Cases. Filed Oct. 22d, 1894.

THE BOSTON NATIONAL BANK OF SEATTLE, Appellant,
v.
THE CITY OF SEATTLE and ADOLPH KRUG, Tax-collector of said City, Respondents. } No. 1285.

THE NATIONAL BANK OF COMMERCE OF SEATTLE, Appellant,
v.
THE CITY OF SEATTLE and ADOLPH KRUG, Tax-collector of said City, Respondents. } No. 1286.

THE PUGET SOUND NATIONAL BANK OF SEATTLE, Appellant,
v.
THE CITY OF SEATTLE and ADOLPH KRUG, Tax-collector of said City, Respondents. } No. 1287.

THE SEATTLE NATIONAL BANK, Appellant,
v.
THE CITY OF SEATTLE and ADOLPH KRUG, Tax-collector of said City, Respondents. } No. 1288.

23 STILES, *J.*:

The complaints in these cases were drawn with a view to

obviate the objections sustained to the complaint in First Nat. Bank of Aberdeen *v.* Chehalis Co., 6 Wash. 64, 32 Pac. 1051. This endeavor is made by the allegation that certain taxable moneyed capital, alleged in the former case to be "owned by citizens of said State, resident in said county, and there invested in loans and securities to them payable, and owing by other citizens of said State, residing in said county," is "owned by individual citizens of said State, resident in said county (or city), and there invested in interest-bearing loans, discounts, and securities to them payable, and owing by other citizens of said State, residing in said county (or city), of vast amount." It is also alleged in these cases that the capital referred to is "all the moneyed capital in the State owned by resident individual citizens, and invested as aforesaid in interest-bearing loans, discounts, and securities, except that owned by and invested in incorporated banks located in this State," and that it was purposely omitted from assessment and taxation. In these cases our attention is particularly called again to the case of Boyer *v.* Boyer, 113 U. S., 689, 5 Sup. Ct., 706, and it is claimed that the allegations contained in the complaints before us, as well as in the case of First Nat. Bank of Aberdeen *v.* Chehalis Co., *supra*, are equally as strong as those of the Boyer case, in which the Federal Supreme Court held that answer should be made to the allegations of the bill. While, as was remarked in Mercantile Bank *v.* City of New York, 121 U. S., 138, 7 Sup. Ct., 826, in the Boyer case no attempt was made "to define the meaning of the words, 'moneyed capital in the hands of individual citizens,' as used in the statute, or to enumerate all the various kinds of property or investments that came within its description, or to show that shares of stock in the hands of stockholders of every institution, company, or corporation of a State, having a capital employed for the purpose of earning dividends or profits for its stockholders, were taxable as moneyed capital in the hands of individual citizens," it was made to appear in the former case that the burden of county taxation had, by the Pennsylvania act of 1844, been removed from a large body of certain specific moneyed capital which came into competition with capital invested in national banks, and that, therefore, a discrimination existed against the latter. The capital exempted for purposes of local taxation was made taxable for State purposes, but the stock of national banks was, by the Pennsylvania act of 1870, taxable both for State and county purposes. In this a discrimination was held to exist, and for that reason an answer was required to the bill. But, whatever may be said of the decision in Boyer *v.* Boyer, it seems clear to us that the case of Mercantile Bank *v.* City of New York, while it does not overrule the decision in the former case, so clearly sets forth the principles upon which alone the question of what is "moneyed capital in the hands of individual citizens" can be decided, that it is at least doubtful whether a like ruling would have been made had the two cases been considered together, at least as to some of the items set forth in the bill. The facts upon which the court ruled in Mercantile Bank *v.* City of New York are clearly set forth on page 146 of the report in 121 U. S., and page 830, 7

Sup. Ct., and it is held that no discrimination existed by reason of the exemption of certain capital from taxation in the State of New York, because, according to subsequent definitions laid down in the decision, it does not constitute "moneyed capital in the hands
24 of individual citizens," within the meaning of the act. Now in the cases before us, it may be that the allegation that the' unassessed capital, being "all the moneyed capital owned by resident individual citizens, and invested in interest-bearing loans, discounts, and securities, except that owned by and invested in incorporated banks," may include capital the exemption of which would create a discrimination as against that of national banks, provided the amount of the exemption was great enough in volume to be considered material. But the difficulty with the complaints is that they are general in their language, and do not set forth with the particularity even of the Boyer case the classes of unassessed moneyed capital with clearness sufficient to enable the court to say that any material quantity of moneyed capital coming into competition with that of national banks has been left unassessed. The only attempts made in the complaints to designate the classes of capital alleged to have been exempted by the assessors is through the allegation that moneyed capital invested in the stocks and bonds of insurance, wharf, and gas companies is not intended to be included in the term "moneyed capital" as used by the pleader. Now, without attempting an analysis, it is clear from the Mercantile Bank case that investments of money can be made in various ways, and even in loans and discounts, without necessarily bringing such investments within the term "moneyed capital," as used in the act of Congress. The conclusion of the whole matter seems to us to lie in the language used by the Supreme Court of the United States in this wise: "The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment." It is moneyed capital of this class, employed in carrying on operations of the same character as those which are within the powers of national banks, which comes into competition with the business of national banks, and such capital, in the hands of individual owners, is what is intended to be described by the act of Congress; and until it appears that there is some considerable amount of moneyed capital of this kind employed in this way, which is exempted by operation of law or by the wilful act of the assessors, a case is not made showing a discrimination against national banks.

A further point is made in this case, viz., that the revenue law of

1893 unconditionally repealed the revenue law of 1891, and contains no saving clause covering uncollected taxes on personal property, and that, therefore, the treasurers of the county of King and of the city of Seattle are without power or authority to proceed with the collection of such taxes. It is true that section 137 of the revenue law of 1893 in sweeping terms repeals all acts theretofore enacted providing for the assessment and collection of taxes. The unpaid taxes on real property are clearly saved by the terms of section 136, but, if the taxes on personalty are preserved at all, the saving clause is found in section 75 of the act. It cannot be presumed for a moment that it was the intention of the legislature to release unpaid taxes from so recent an assessment as that of the year 1891, and we think it would be the duty of this court to construe any even doubtful provisions which might be found in the act of 1893 as fairly tending to show an intention on the part of the legislature to preserve the right to collect unpaid taxes, notwithstanding the repeal of all former laws on the subject of taxation. Now, section 75 occurs in the portion of the act which is unquestionably devoted to the future operation of the law, and, with other sections, it lays out a complete scheme for the assessment and collection of taxes on personal property, and, as a finale to the whole, and notwithstanding that the matter contained in section 73 would seem to terminate the power of the treasurer to collect personal taxes after the lapse of a limited period, section 75 seems to continue both the power and duty of the treasurer, and his successors in office, indefinitely, until the taxes have been paid. At the close of this section occur these words: "This section shall apply to all assessment-rolls and the warrants thereto attached, which have been heretofore issued, upon which taxes may be due and unpaid, as well as those hereafter issued,"—which is to say, in the language of the first part of the section, that the "power and duty" to collect any personal-property tax due and unpaid shall continue in and devolve upon the county treasurer, and his successors in office, until the tax is paid. Now, if the power and duty remain with the treasurer, then, notwithstanding the terms of the repealing section, the act of 1891 must be continued in existence so far as may be necessary to the exercise of that power and the performance of that duty, since without the existence of the law the treasurer has neither power to act nor duty to perform. The various sections of the act must be construed together, and harmonized, if possible, so that, if it were impossible to say that this power and duty should continue in the treasurer in view of the positive terms of the repealing section, then, of course, the latter section, being the last in the act, would prevail; but, as it is not unreasonable, both can stand. Taking it all and all, and considering sections 75 and 136, the effect of the repealing section is simply to make the act of 1893 a future revenue law, leaving unpaid taxes under former laws to be collected either as prescribed in those laws or according to the new methods of the later law, when it is so directed. The judgment of the superior court sustaining the demurrers will be affirmed.

Dunbar, C. J., and Hoyt, Scott, and Anders, JJ., concur.

26 In the Supreme Court of the State of Washington.

THURSDAY, *November 22d*, 1894.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Appellant,
vs.
THE COUNTY OF KING, in the State of Washington, & A. P. MITTEN, Treas., Respondent. } No. 1280. Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of King county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 22d day of November, A. D. 1894, on motion of John F. Miller, Esquire, of counsel for respondent, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is hereby, affirmed with costs, and that the said County of King and A. P. Mitten, treasurer, have and recover of and from the said The Washington National Bank of Seattle, and from M. F. Backus and Edward O. Graves, sureties, the costs of this action, taxed and allowed at forty-two dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

Vol. 3, Journal, page 332.

27 In the Supreme Court of the State of Washington.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Plaintiff, Appellant,
vs.
THE COUNTY OF KING, in the State of Washington, and A. P. Mitten, as Treasurer and *ex Officio* Tax-collector of said County (Successor in Office of and Substituted in this Action for Byron Phelps), Defendants, Respondents. } No. —. Petition for Writ of Error.

To the honorable the chief justice of the supreme court of the State of Washington:

The petition of The Washington National Bank of Seattle, plaintiff and appellant in the above-entitled action, respectfully shows:

That your petitioner is the plaintiff and appellant in the above-entitled action, and that final judgment therein was rendered and filed in this court on the 22nd day of October, 1894, and entered on the 22nd day of November, 1894, in and by which judgment the judgment of the superior court of King county, State of Washington, dismissing the complaint of your petitioner and rendering judgment in favor of the defendants and against your petitioner for costs was affirmed; that said final judgment rendered by this court in said action was greatly to the prejudice and injury of your

petitioner; which said judgment and the proceedings leading thereto are erroneous in many particulars; that in said action there was drawn in question the validity of an act of the legislature of the State of Washington entitled "An act to provide for the assessment and collection of taxes in the State of Washington and declaring an emergency," approved March 7th, 1891; which said act, and especially section 21 thereof, was claimed by your petitioner
28 to be in conflict with and repugnant to section 5219 of the Revised Statutes of the United States, and also to be in conflict with and repugnant to the Constitution of the United States, but the decision and judgment of this court upon said act was in favor of the validity of said act and sustained the validity thereof against the contention of your petitioner; that in said action your petitioner also claimed that the method of the enforcement of the said act of the legislature of the State of Washington for the assessment and collection of taxes in said State was in conflict with said section 5219 of the Revised Statutes of the United States, and that your petitioner and its stockholders were thereby relieved from all taxation under said act of the legislature of the State of Washington and under the laws of the State of Washington, but that this court decided against the claim of your petitioner.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays that it may be allowed a writ of error in said cause, and that a supersedeas in said cause be allowed your petitioner; that said cause be transmitted to the honorable the Supreme Court of the United States, at Washington, to determine said errors, and that proper orders touching the security required of your petitioner may be made.

And your petitioner will, as in duty bound, ever pray, etc.

CARR & PRESTON AND
JAMES B. HOWE,
Attorneys for Plaintiff.

(Endorsed:) No. 1280. Filed Nov. 22, 1894. C. S. Reinhart, clerk.

29 In the Supreme Court of the State of Washington.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Plaintiff, Appellant, *vs.* THE COUNTY OF KING, in the State of Washington, and A. P. Mitten, as Treasurer and *ex Officio* Tax-collector of said County (Successor in Office of and Substituted in this Action for Byron Phelps), Defendants, Respondents.	No. —. Order Granting Writ of Error.

Now, on this 22nd day of November, 1894, on hearing read the petition of The Washington National Bank of Seattle, the plaintiff

and appellant in the above-entitled action, praying for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Washington, and it appearing by said petition and by the record in the above-entitled case that said case is a proper case for the allowance of said writ: now, therefore, it is—

Ordered by the undersigned, the chief justice of the supreme court of the State of Washington, that said writ be, and the same is hereby, allowed, and that the said Washington National Bank of Seattle execute to the defendants in said suit its bond, with sureties thereon to be approved by the undersigned, in the sum of one thousand dollars, and said bond when executed and approved by the undersigned shall operate as a supersedeas bond in said action, and thereupon all further proceedings upon the judgment rendered by this court in said action shall be stayed pending the hearing and determination of said writ of error by the United States Supreme Court.

30 Dated this 22nd day of November, 1894.

R. O. DUNBAR,
Chief Justice of the Supreme Court of the State of Washington.

Entered, Journal, vol. 3, pg. 338.

(Endorsed:) No. 1280. Filed Nov. 22, 1894. C. S. Reinhart, clerk.

31 In the Supreme Court of the United States.

WASHINGTON NATIONAL BANK OF SEATTLE, Plaintiff in Error,
vs.
THE COUNTY OF KING, in the State of Washington, and A. P. Mitten, as Treasurer and *ex Officio* Tax-collector of said County (Successor in Office of and Substituted in this Action for Byron Phelps), Defendants in Error.
} Assignment of Errors.

Afterwards, to wit, on the 22nd day of November, 1894, comes the Washington National Bank of Seattle, plaintiff in error, by its attorneys, James B. Howe and Carr & Preston, and says that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

I.

The superior court of King county erred in sustaining the demurrer of the defendants (here defendants in error) to the complaint of the plaintiff (here plaintiff in error).

II.

The supreme court of the State of Washington erred in holding that the said demurrer was properly sustained.

III.

The said superior court erred in rendering judgment of dismissing the complaint.

IV.

The supreme court erred in affirming the judgment of the superior court.

32 V.

The said superior and supreme courts erred in deciding that the assessment complained of was not an assessment upon the plaintiff in error of its capital stock *in solido*, and therefore void because in contravention of the provisions of sections 5214 and 5219 of the Revised Statutes of the United States.

VI.

The said superior and supreme courts erred in deciding that the said assessment and the threatened levy thereunder directly upon the property of the plaintiff was not a taxation of the capital of plaintiff in error forbidden by the provisions of section 5219 of the Revised Statutes of the United States and also by the provisions of the Constitution of the United States.

VII.

The said superior and supreme courts erred in deciding that the revenue laws of the State of Washington in force at the time of said assessment and levy are not in conflict with the provisions of section 5219 of the Revised Statutes of the United States, and with the provisions of the Constitution of the United States, because a tax upon the capital of the plaintiff in error is thereby expressly required.

VIII.

The said superior and supreme courts erred in deciding that section 21 of the revenue act of 1891 of the State of Washington (entitled "An act to provide for the assessment and collection of taxes in the State of Washington and declaring an emergency,"
33 approved March 9th, 1891) is not in conflict with the provisions of section 5219 of the Revised Statutes of the United States and also with the Constitution of the United States, because a tax upon the capital of the plaintiff in error is thereby expressly required.

IX.

The said superior and supreme courts erred in refusing to hold that the only legislation of the State upon the subject of taxation of bank stock or capital being void for the reasons stated in the foregoing assignment No. 8, therefore the shares of the capital stock of the plaintiff in error were exempted from taxation, and the said

assessment and threatened levy deprive the plaintiff in error of its property without due process of law.

X.

The said superior and supreme courts erred in holding that the admitted intentional omission of twenty-six millions of taxable moneyed capital in the hands of resident individual citizens of the State and invested in interest-bearing private loans and securities, to them payable and owing by other resident citizens of the State out of a total of thirty-seven millions of moneyed capital in the State, was an omission of so material a portion relatively of the whole of such moneyed capital as to create an unequal and unfriendly competition against the plaintiff in error and as to amount to an unfriendly discrimination against the moneyed capital invested in shares of the capital stock of the plaintiff in error, and in not holding that for that reason the tax is void *in toto*.

34

XI.

The said superior and supreme courts erred in holding that the revenue laws of the State of Washington (act approved March 9th, 1891, aforesaid) contemplated such omission and consequent discrimination and were not invalid for so providing.

XII.

The said superior and supreme courts erred in refusing to decide that the method of assessment pursued and the resulting discrimination against national-bank shares violated the provisions of sections 1, 2, and 3 of article 7 of the constitution of the State of Washington, and therefore the assessment should be annulled and the levy restrained.

Wherefore the said The Washington National Bank of Seattle, plaintiff in error, prays that the judgment of the said superior and supreme courts of the State of Washington be reversed.

CARR & PRESTON,
JAMES B. HOWE,
Attorneys for the Plaintiff in Error.

(Indorsed:) No. 1280. Filed Nov. 22, 1894. C. S. Reinhart, clerk.

35 In the Supreme Court of the State of Washington.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Appellant,
vs.
THE COUNTY OF KING, in the State of Washington, and Byron Phelps, as Treasurer and *ex Officio* Collector of Taxes for said County, Respondents. } No. 12878.

} Order of Court.

COMMERCIAL NATIONAL BANK OF SEATTLE, Appellant,
vs.
THE COUNTY OF KING, in the State of Washington, and Byron Phelps, as Treasurer and *ex Officio* Collector of Taxes for said County, Respondents. } No. 12879.

It being made to appear to the court by oral stipulation in open court, by the attorneys for the respective parties hereto, that Byron Phelps, one of the respondents herein, has ceased to hold office as county treasurer of the county of King, and that A. P. Mitten is his successor in office—

It is by the court ordered that the said A. P. Mitten, as such county treasurer, be, and he is hereby, substituted as respondent in these causes in place of the respondent Byron Phelps.

Done in open court this 25th day of June, A. D. 1894.

That the answers herein be considered as amended so as to strike the name of Phelps as answering and insert the name of Mitten.

O K.
PRESTON.
O K.
PILES.

(Indorsed:) Filed Jul- 3, 1894. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

36 In the Supreme Court of the United States.

THE WASHINGTON NATIONAL BANK OF SEATTLE, Plaintiff, Appellant,
vs.
THE COUNTY OF KING, in the State of Washington, and A. P. Mitten, as Treasurer and *ex Officio* Tax-collector of said County (Successor in Office of and Substituted in this Action for Byron Phelps), Defendants, Respondents. } No. —. Bond.

Know all men by these presents that we, The Washington National Bank of Seattle, in the State of Washington, as principal, and E. O. Graves and M. F. Backus, as sureties, both of the city of Seattle,

in said State of Washington, are held and firmly bound unto the County of King, in the State of Washington, and A. P. Mitten, as treasurer and *ex officio* tax-collector of said county, in the full and just sum of one thousand dollars, to be paid to the said County of King and A. P. Mitten, as treasurer and *ex officio* tax-collector of said county, their successors and assigns; to which payment, well and truly to be made, we do hereby bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22nd day of November, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a session of the supreme court of the State of Washington, in a suit pending in said court between The Washington National Bank of Seattle, as plaintiff, and The County of King, in the State of Washington, and A. P. Mitten, as treasurer and *ex officio*
37 tax-collector of said county, a final judgment was rendered by said supreme court of the State of Washington against the said plaintiff and in favor of the said defendants, and the said plaintiff having obtained a writ of error and filed the same, together with a copy thereof, in the clerk's office of the said supreme court of the State of Washington to reverse said judgment in the aforesaid suit, and a citation directed to the said County of King, in the State of Washington, and A. P. Mitten, as treasurer and *ex officio* tax-collector of said county, citing and admonishing them and each of them to be and appear at the Supreme Court of the United States, to be holden at Washington, on the 21st day of January, 1895:

Now, the condition of the above obligation is such that if The Washington National Bank aforesaid shall prosecute said writ of error to effect and answer all damages and costs if it fail to make said plea good, then this obligation to be void; else to remain in full force and virtue.

THE WASHINGTON NATIONAL BANK OF SEATTLE, [SEAL.]
By M. F. BACKUS, *Cashier.* [SEAL.]
E. O. GRAVES. [SEAL.]
M. F. BACKUS. [SEAL.]

Signed, sealed, and delivered in the presence of—
WM. THAANUM.
W. R. BELL. [SEAL.]

38 STATE OF WASHINGTON, *County of King,* } ss:

M. F. Backus and E. O. Graves, being first duly sworn according to law, on their oaths respectively do say, each for himself, that he is one of the sureties who signed and sealed the within bond; that he is above the age of twenty-one years; that he is a *bona fide* resident of the State of Washington and property-holder therein; that he is neither a counselor nor attorney at law, sheriff of a county, clerk of superior court, nor other officer whatever of any such court, and that he is worth the sum of one thousand dollars in

property situate in the State of Washington over and above all his just debts and liabilities whatsoever, exclusive of property exempt from execution.

E. O. GRAVES.
M. F. BACKUS.

Subscribed and sworn to before me this 22nd day of November, 1894.

[NOTARIAL SEAL.] W. R. BELL,
Notary Public in and for the State of Washington, Residing at Seattle, in said State.

The foregoing bond and the sufficiency of the sureties thereon taken and approved by me this 22nd day of November, 1894.

R. O. DUNBAR,
Chief Justice of the Supreme Court of the State of Washington.

(Indorsed:) No. 1280. Filed Nov. 22, 1894. C. S. Reinhart, clerk.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Washington, before you or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between The Washington National Bank of Seattle, appellant and plaintiff in said court and plaintiff in error in this court, and The County of King, in the State of Washington, and A. P. Mitten, as treasurer and *ex officio* tax-collector of said county, defendants and respondents in said court and defendants in error in this court, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of The Washington National Bank of Seattle, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly,

you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 21st day of January, 1895, in the said Supreme
40 Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 22nd day of November, in the year of our Lord one thousand eight hundred and ninety-four.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States
for the District of Washington.
R. M. HOPKINS, *Deputy.*

{ Seal United States Circuit Court, District of Washington, Northern Division. }

Allowed by—
R. O. DUNBAR,
Chief Justice of the Supreme Court
of the State of Washington.

40½ [Endorsed:] 1280. In the Supreme Court of the United States. The Washington National Bank of Seattle, plaintiff in error, *vs.* The County of King, in the State of Washington, and A. P. Mitten, as treasurer and *ex officio* tax-collector of said county (successor in office of and substituted in this action for Byron Phelps), defendants in error. Writ of error. Filed Nov. 22, 1894. C. S. Reinhart, clerk.

41 UNITED STATES OF AMERICA, *ss:*

To the County of King, in the State of Washington, and A. P. Mitten, as treasurer and *ex officio* tax-collector of said county, and each of you, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States, at Washington, on the 21st day of January, 1895, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Washington, wherein The Washington National Bank of Seattle is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of November, 1894.

[Seal of the Supreme Court, State of Washington.]

R. O. DUNBAR,
Chief Justice of the Supreme Court
of the State of Washington.

Attest my hand and seal of said court this Nov. 22, 1894.

C. S. REINHART, *Clerk.*

41½ Received, this 23rd day of November, 1894, a copy of the within citation, and service of the within citation upon the defendants in error is this day acknowledged.

JOHN F. MILLER,
Att'y for King County, Wash.,
and the Defendants in Error.

[Endorsed:] 1280. In the Supreme Court of the United States. The Washington National Bank of Seattle, plaintiff in error, *vs.* The County of King, in the State of Washington, and A. P. Mitten, as treasurer and *ex officio* tax-collector of said county (successor in office of and substituted in this action for Byron Phelps), defendants in error. Citation. Filed Nov. 26, 1894. C. S. Reinhart, clerk, by R. B. Crandall, deputy.

42 In the Supreme Court of the State of Washington.

STATE OF WASHINGTON, } *ss:*
County of Thurston, }

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above-entitled cause, and I further certify that in pursuance of the writ of error filed herein I herewith transmit said record to the United States Supreme Court, together with the original writ of error and citation issued herein.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 18th day of January, 1895.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: Case No. 15,792. Washington supreme court. Term No., 226. The Washington National Bank of Seattle, plaintiff in error, *vs.* The County of King, in the State of Washington, & A. P. Mitten, as treasurer & *ex officio* tax-collector of said county. Filed February 14th, 1895.

166-463

Office Supreme Court, U. S.
FILED
DEC 28 1896
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1896.

No. 226.

THE WASHINGTON NATIONAL BANK OF SEATTLE,
PLAINTIFF IN ERROR,

VS.

THE COUNTY OF KING IN THE STATE OF WASHINGTON AND A. P. MITTEN, AS TREASURER AND EX-OFFICIO TAX COLLECTOR OF SAID COUNTY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

EUGENE M. CARR,
HAROLD PRESTON,
JAMES B. HOWE,
Counsel for Plaintiff in Error.

Lowman & Hanford Stationery & Printing Co., Seattle.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1896.

No. 226.

THE WASHINGTON NATIONAL BANK OF SEATTLE,
PLAINTIFF IN ERROR,

VS.

THE COUNTY OF KING IN THE STATE OF WASHINGTON AND A. P. MITTEN, AS TREASURER AND EX-OFFICIO TAX COLLECTOR OF SAID COUNTY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error, a national bank located in the City of Seattle, in the County of King, State of Washington, instituted this action in the Superior Court of said county to enjoin the county and its treasurer and ex-officio collector of taxes from levying upon the goods and chattels of the bank, in order to satisfy a tax assessed upon the capital of the bank, which assessment plaintiff alleged was void because forbidden by the Constitution of the United States and the provisions of Sections 5214 and 5219 of the Revised Statutes of the United States. It appears from the complaint that not only was the assessment *in solido* to the plaintiff as owner of all of the shares of the capital stock of the plaintiff, but also that the taxation

thereof was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State of Washington. Folios 1-10. The defendants filed their answer, but subsequently withdrew the same and demurred to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action. Folio 12. The court sustained the demurrer, the plaintiff excepting, and, the plaintiff electing to stand upon its complaint, the court rendered judgment of dismissal. Folios 13-14. The plaintiff appealed from said decree to the Supreme Court of the State of Washington, which court affirmed the decree appealed from, on the ground that the laws of the state, under which the taxation was justified, and the acts of the taxing officers complained of, were not repugnant to any provision of the Constitution of the United States or to Sections 5214 and 5219 of the Revised Statutes of the United States. (Opinion of Court, folios 22-25.)

The plaintiff thereupon sued out a writ of error from this court which was allowed by the Chief Justice of the State, and was duly served. Folios 27-29-39-40½. A citation was duly issued and served. Folios 41, 41½. The plaintiff in error filed its assignment of errors specifying the errors claimed by it to have been committed by the Supreme Court of the State. Folios 31 to 34.

The errors assigned in the assignment of errors may be condensed, and so condensed the plaintiff in error relies upon the following specified errors for reversal of the judgment of the Supreme Court of the State:

I.

That Section 21 of the Revenue Law of the State of Washington, approved March 9, 1891, entitled, "An act to provide for the assessment and collection of taxes in the State of Washington, and declaring an emergency," under which, the capital stock of the plaintiff in error was assessed and taxed, was and is in conflict with the Constitution of the United States, and with Sections 5214 and 5219 of the Revised Statutes of the United States, and the Supreme Court of the State of Washington erred in not so holding.

II.

That the assessment complained of by the plaintiff in error was an assessment *in solido* to the plaintiff in error as the owner of the whole number of shares of its capital stock, and amounted to the assessment and taxation of the capital of the plaintiff in error, and was in contravention of the Constitution of the United States and of Sections 5214 and 5219 of the Revised Statutes of the United States, and the Supreme Court of the State of Washington erred in not so holding.

III.

That the Supreme Court of the State of Washington erred in not holding that the taxation of the shares of the capital stock of the plaintiff was at a greater rate than was assessed upon other moneyed taxable capital in the hands of individual citizens of the State of Washington, and therefore conflicted with Section 5219 of the Revised Statutes of the United States.

IV.

That the Supreme Court of the State of Washington erred in not holding that the intentional omission from taxation by the several counties of the state of $26,000,000 of competing taxable moneyed capital in the hands of individual citizens, out of a total of such competing moneyed capital taxable in the state of $37,000,000, accompanied by the assessment of national bank stock throughout the State at a minimum of 85 per cent. of its par and of the state bank stock throughout the state at much less than 57 per cent. of its par, was an intentional omission from taxation of so large a part relatively of the entire moneyed capital in the hands of individual citizens and properly taxable, as to amount to a discrimination against the shares of stock of the plaintiff in error, and a willful violation of the provisions of said Section 5219 of the Revised Statutes of the United States.

V.

The Supreme Court of the State of Washington erred in not holding that the intentional omission from taxation by the

county of $6,000,000 of competing taxable moneyed capital in the hands of individual citizens resident and taxable in the county, accompanied by the taxation of the shares of stock of the national banks located in the county at their value and at a rate uniform with other taxed property was a discrimination against national bank stock in favor of competing capital in the county and violative of the provisions of Section 5219 of the Revised Statutes of the United States.

VI.

That the Supreme Court of the State of Washington erred in not holding that the allegations of the complaint being admitted by the demurrer, showed a plain and clear case of the violation of the Constitution of the United States and of Sections 5214 and 5219 of the Revised Statutes of the United States by the taxing officers of the ~~City~~ County of ~~Seattle~~ King whereby the plaintiff in error and its stockholders were deprived of the equal protection of the law, and of their property without due process of law, and of the protection of Sections 5214 and 5219 of the Revised Statutes of the United States.

ARGUMENT.

Error No. 1.

The Supreme Court of the State of Washington erred in holding that the plaintiff's complaint did not show that the plaintiff's capital had been taxed in violation of the Constitution of the United States and of Sections 5214 and 5219 of the Revised Statutes of the United States.

The assessment in the case at bar was made under Section 21 of an Act of the Legislature of the State of Washington, entitled, "An act to provide for the assessment and collection of taxes in the State of Washington, and declaring an emergency," approved March 9, 1891. Laws of Washington, 1891, pp. 280-289.

Section 21 of the Act is as follows:

"Section 21. Every individual, firm, corporation or association of persons, carrying on a general banking business in this state, whether the same has been organized under the banking laws of this state or of the United States, or conducted under the style of private bankers, shall be assessed and taxed in the county, town, city or village where such bank or banking association is located and not elsewhere, in the following manner: Annually, at such times as provided for listing property for taxation, every such bank or banking association as contemplated in this section shall, by its accounting officer, furnish the county or city assessor a statement, verified by oath, giving the amount of paid-up capital stock, the amount of surplus or reserve fund and the amount of undivided profits of such bank or banking association. The aggregate amount of capital, surplus, and undivided profits shall be assessed and taxed as other like property in the state is assessed and taxed: Provided, at the time of listing the capital stock, the amount and description of its legally authorized investments in real estate shall be assessed and taxed as other real estate is assessed and taxed under this act, and the assessor shall deduct the amount of such investments in real estate from the aggregate amount of such capital, surplus, and undivided profits, and the remainder then taxed as above provided."

The statute is plain, and there is no room for construction. It would be difficult to use any other language than that used to convey the idea that the thing to be assessed and taxed was the capital of the bank.

Van Allen vs. Assessors, 3 Wall. 573.

Bradley vs. People, 4 Wall. 459.

National Bank vs. Commonwealth, 9 Wall. 353.

Section 23 of said Act of the Legislature is as follows:

"Each bank and banking association shall be liable to pay any taxes assessed against them as the agent of each of its shareholders, owners or owner under the provisions of this act, and may pay the same out of their undivided profit account or charge the same to their expense account, or to the accounts of such shareholders, owners or owner in proportion to their ownership."

The aforesaid revenue act in seeking to impose a tax upon the capital of the bank, in terms exempted from taxation the shares of the capital stock of the bank.

Section 8 of the Act is as follows:

"Section 8. Personal property shall be listed in the manner following: First, every person of full age and sound mind, being a resident of this state, shall list all his moneys, bonds or stock, shares of stock of joint stock or other companies (when the property of such company is not assessed in the state), franchises, royalties and other personal property; second, he shall also list separately, and in the name of his principal, all moneys deposited subject to his order; third, the property of a minor child shall be listed by his guardian or by the person having such property in charge; fourth, the property of an idiot or lunatic, by the person having charge of such property; fifth, the property of a person for whose benefit it is held in trust by the trustee of the estate of the deceased person, or by the executor or administrator; sixth, the property of corporations whose assets are in the hands of receivers, by such receivers or their agents; seventh, the property of a body politic or corporate, by the president or proper agent or officer thereof; eighth, the property of a firm or company, by a partner or agent thereof; ninth, money and property in litigation, in possession of any county officer must be assessed to the custodian thereof, and the taxes thereon paid by the custodian thereof under the direction of the court."

So far as Section 23 of the Revenue Act of 1891 requires the bank to pay the tax and charge the same to its expense account, the tax is a direct tax upon the bank itself.

City of Boston vs. Beal, 51 Federal Reporter, 306.
Affirmed, 55 Federal Reporter, 26.

So far as said Section 23 of the said Revenue Act requires the bank to either pay the tax out of undivided profit account or charge the same to expense account or to stockholders, the liability to pay (as construed by the taxing officers in this case by their acts, and by the State Court) is absolute and immediate without regard to ability to pay, existence of undivided profits, or condition of accounts of stockholders.

Therefore the tax is a tax upon the bank.

It is respectfully submitted that Section 23 does nothing more than provide a method for the collection, while Section 21 is the only authority for the assessment of the tax.

That a lawful provision for collecting a tax cannot impart validity to an unlawful provision for its assessment, seems too clear for argument; yet the Supreme Court of the State seems to confound the method of collection with the power to assess, and holds that the end justifies the means.

ERROR NO. 2.

The assessment complained of by the plaintiff in said action was an assessment in solido to the plaintiff as the owner of the whole number of the shares of its capital stock, and amounted to the assessment and taxation of the capital of the plaintiff, and was in contravention of the Constitution of the United States, and of Sections 5214 and 5219 of the Revised Statutes of the United States, and the Supreme Court of the State of Washington erred in not so holding.

Such an assessment and levy is in violation of and is forbidden by the provisions of the Act of Congress permitting an assessment by the State of the shares of national banks to the individual owners thereof, and is therefore void.

Revised Statutes of the United States, Section 5219.

National banks may be taxed by the State only to the extent granted by the permissive provisions of said section 5219.

Covington City National Bank vs. City of Covington, et al., 21 Federal Reporter, 484.

Osborn vs. U. S. Bank, 9 Wheaton, 738.

The proprietary interest of the individual in shares of the stock of a national bank is subject to taxation by the State only to the extent granted by the permissive provisions of said section.

Mercantile National Bank vs. City of New York, 28 Fed. Rep. 776.

People vs. Weaver, 100 U. S. Reports, 539-543.
Boyer vs. Boyer, 113 U. S. 689.
Wasson vs. First National Bank, 107 Ind. 206.
Maguire vs. Board of Revenue, 71 Ala. 401.

An assessment and the taxation of all the shares of the stock of a national bank *in solido* to the bank direct, as owner thereof, constituted a tax upon the bank forbidden by said Section 5219 and rendered void thereby.

First National Bank of Richmond vs. City of Richmond et al., 39 Fed. Rep. 309.
National Bank of Virginia vs. City of Richmond et al., 42 Fed. Rep. 877.
First National Bank of Leoti vs. Fisher, 45 Kansas, 726.
Collins vs. Chicago, 4 Bissell, 472.
Miller vs. First National Bank, 46 Ohio St. 424.

In the case last cited, the invalidity of such a form of taxation was clearly pointed out. In that case the court said:

"As regards the bank, there is but one question in the case that needs to be determined,—for the determination of it will dispose of all the others that have been raised—that is, whether the shares of stock in a national bank are to be listed for taxation in the names of the shareholders or in the name of the bank. The power of a state to impose any tax upon such shares is conferred by the statutes of the United States,—Section 5219, Revised Statutes. This is not controverted. It is also true that the property of a national bank, other than its realty, cannot be subjected to taxation by a state or any of its subdivisions. The power conferred by the section just referred to, is to include the 'shares' in the valuation of the personal property of the 'owner' or 'holder' of such shares. The bank does not own the shares of its capital. It owns the capital and the shares are owned by its shareholders. The capital is corporate property; the shares in it are the individual property of its shareholders. It is the latter that may be taxed, and not the former. No authority is conferred to assess them for taxation against the bank itself; and, to so assess them, would be but another form of taxing the capital of the bank itself, which no one contends could be done, without the authority of Congress. A share in a bank is but a fractional part of its capital

owned by one who contributed an equivalent part of the capital, or his transferee; and the aggregate of all the shares held by individuals in a bank is equal to the aggregate of the capital; so that, if all the shares in a bank were assessed for taxation in its name, and payment of a tax required of it, the effect would be precisely the same as a tax upon the aggregate capital of the bank. Again, as the shares are to be assessed for taxation according to their true value in money, a tax so levied would extend to and include all the property of the bank, its personalty, in the valuation placed on the shares in its capital stock, and its realty, under the exception contained in Section 5219, Revised Statutes of the United States. It seems, then, to follow, as a necessary result, that shares in a national bank must be assessed for taxation in the names of the owners of them, and not in the name of the bank itself. The language of the statute under which the power is conferred on a state to tax such shares is such; and the power conferred must be confined to the language; or the exemption of the bank itself from taxation may be reduced to an empty expression."

The case of the Bank vs Commonwealth, 9 Wallace, 353, does not support the decision of the Supreme Court of the State in this case.

An examination of that case will show that it has no application to the case at bar. In that case it was sought to hold the bank liable for a tax assessed upon the shares of its stockholders, but the assessment had been made against the stockholders. In the case at bar the assessment was made directly to the bank and not to to the stockholders. In the case cited suit was brought against the bank and this court held that the suit was in the nature of a garnishment proceeding.

In the case at bar the bank was not sued at all. The collector of taxes was about to levy upon the property of the bank before obtaining judgment against the bank, and without regard to the question of the indebtedness of the bank to its shareholders.

The distinction between the two cases is clearly pointed out in the case of

Hershire vs. First Nat. Bank, 35 Iowa, 272.

ERRORS NOS. 3, 4, 5 AND 6.

The Supreme Court of the State erred in not holding that the complaint showed that the taxation of the shares of the capital stock of the plaintiff was at a greater rate than was assessed upon other moneyed capital in the hands of invididual citizens of the State, resident and taxable in the State and County, and therefore was void under Section 5219 of the Revised Statutes of the United States.

The total moneyed capital owned by residents of the State on April 1st, 1891, invested in loans at interest and upon notes and securities, exclusive of that invested in shares of stock of national banks and banks incorporated under the laws of the State, was $26,000,000. (Folio 6) The total capitalization of national banks in the State was then $7,000,000, and that of state banks $4,000,000. The national banks were assessed at a minimum of 85 per cent. of their par value. The state banks, together with all the bonds and shares of insurance, gas and wharf companies were assessed at $2,255,503, or less than 57 per cent. of the par of state bank stock *alone*. (Folio 7.) All of this $26,000,000 of moneyed capital invested in loans at interest and upon interest bearing notes and securities, was purposely omitted from taxation by the taxing officers (Folios 6-7), and the omission was in pursuance of a pre-arranged scheme between the several taxing officers throughout the State. Of this $26,000,000 of omitted competing taxable moneyed capital $6,000,000 was omitted in King County. This 'other moneyed capital' was 'in the hands of individual citizens of the State' and was taxable. (Folios 6-7.) The borrowers and payors were likewise residents of the State.

The following table condenses the figures above given, to-wit:

National bank capitalization	$ 7,000,000 00
State bank Capitalization	4,000,000 00
In the hands of resident individual citizens, omitted	26,000,000 00
Total taxable moneyed capital	$37,000,000 00

The assesment thereof was as follows:

National bank stock (more than)*	$ 5,950,000 00
All other moneyed capital (less than)	2,255,503 00
Total assessment	$ 8,255,503 00

* In some instances national bank stock was assessed at more than 85 per cent of its par. (Paragraphs 5 and 6 of the complaint Folios 6 and 7.)

It cannot be doubted from the foregoing statement, that the withdrawal from taxation of 70 per cent. of the total moneyed capital in the hands of individual citizens in the state, had the effect of taxing national bank shares at a greater rate than the remaining moneyed capital in the hands of individual citizens was taxed.

In this connection it is proper to call attention to the important fact that this omitted moneyed capital was taxable, is so alleged in the complaint and admitted by the record. The levy in the county was at the rate of thirteen mills on each dollar of valuation. It seems clear that if the $26,000,000.00 of omitted taxable capital had not been omitted throughout the state, the rate of levy for state purposes upon bank stock as well as other taxable property would have been lowered. It seems equally clear that if the $6,000,000 had not been omitted in King county the rate of levy for county as well as state purposes upon bank stock and other taxable property would have been less than thirteen mills. But the forbidden discrimination resulted from imposing a rate of thirteen mills upon national bank stock and no rate at all upon the $26,000,000 of omitted competing capital. It seems too plain to admit of argument, that the omission of $26,000,000.00 out of a total of $37,000,000.00 of taxable moneyed capital is an unlawful discrimination against the moneyed capital that is taxed. If all the banks in the state had been located and assessed in King county, even then the ratio of omitted capital (competing with the national banks) to like capital as assessed (including the national banks) would have been as 6 to $8\frac{1}{4}$.

It cannot be gathered from the opinion of the Supreme Court of the State whether it considers the missing allegations

to be those which should go to show that the class of moneyed capital omitted is such as comes in competition with national banks, or such as would go to show that the amount thereof is considerable in relation to the total of such capital in existence, or, whether the court was unable to find either of these necessary facts sufficiently alleged.

The embarrassment of the Supreme Court of the State in this connection is nowhere more pointedly evidenced than in the communication subsequently addressed by the Supreme Court, in compliance with the mandate of the State Constitution, to the Governor of the state, calling his attention to apparent defects in the laws of the state, wherein this language is used:

"Twice this Court has been called upon to review cases involving the assessment of the stock of national banks for taxation. The First National Bank of Aberdeen vs. The County of Chehalis, 6 Washington, 64; Washington National Bank vs. The County of King, decided October 22, 1894. In both cases the assessments were upheld, but in both, the decision was arrived at only upon a construction of the law which was not satisfactory to this Court, to say the least. These cases have been appealed to the Supreme Court of the United States, and it is not at all beyond the bounds of possibility that that tribunal may come to a different conclusion. The trouble with the statute upon this subject is, that it is obscure, involved and uncertain, and there is great danger that unless it is revised, there will come a time when the State will be practically without a law for the proper taxation of the property of banks and other financial institutions and particularly national banks. A careful revision of this subject should be made, with a special view to the avoidance of double taxation and in the light of the experience of other states, to the end that this vexed question may be set at rest."

Public Documents, State of Washington, 1894–5, Report of Supreme Court, paragraph 6, pp. 6–7.

These facts certainly appear from the complaint: The omitted capital—

1. Was moneyed capital;

2. Was taxable;

3. Was not invested in bank stock;

4. Was owned by individual citizens who resided in the State;

5. Was loaned at interest;

6. Was loaned to other individual resident citizens;

7. Was invested in interest bearing loans and securities; therefore excluded from consideration the accounts denominated by the Supreme Court, in its opinion in First National Bank of Aberdeen vs. County of Chehalis, as *mere debts;* excluded store bills, demands for tort committed, capital invested in shares of stock of incorporated bodies of all kinds, not competing.

8. Formed a very material point relatively (75 per cent.) of the total moneyed capital in the hands of individual citizens within the jurisdiction levying the tax upon the shares of the plaintiff.

The Supreme Court of the State in considering the allegations of the complaint, applied a very different rule of law in testing the sufficiency of the complaint from that which in Holland vs. Isaacs, 4 Wash. 54, it announced to be the correct one:

"As to the rule of construction to be recognized, Section 94 (Code) provides that: In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed. All prior forms of pleading were abolished by the Code and it prescribed what they should be thereafter and also the rule by which their sufficiency should be determined.

In Chambers vs. Hoover, 3 Wash. Ter. 110, speaking of the complaint in that case, to which a demurrer had been interposed, Turner, J., says:

"'The averments of this pleading are vague and indefinite and it is defective in other respects, yet when bolstered by the rule of liberal construction commanded by the code, we think we discern a cause of action. A suitor is no longer to be turned out of court if by making all reasonable intendments in his favor, enough can be seized hold of in his pleadings to show that he has rights which ought to be enforced. He may be required on motion to conform his statements to the rules of good pleading, and if he refuse, may be turned out of court,

but as against a demurrer, the office of which is to raise a substantial issue on the law of the case and not on the law of practice and pleading, evidentiary facts and even inferences from averments amounting to mere conclusions of law, will be considered in his favor.' * * *

"Under our practice, the old rule that the pleading must be most strongly construed against the pleader is not recognized. It must be liberally construed with an aim to arrive at substantial justice between the parties."

We respectfully submit, however, that the plaintiff in error is not, in order to obtain a reversal of the judgment of the Supreme Court of the State, compelled to invoke the liberal rule of pleading formally announced by that court.

It is confidently asserted that tested by the rule established by this Court in Boyer vs. Boyer, 113 U. S. 689, and Mercantile Bank vs. New York, 121 U. S. 138, the complaint is sufficient to require an answer from the defendants.

A comparison of the language of the complaint with that of the opinion in the case last cited, will convince the Court that the confidence above expressed is fully warranted.

COMPLAINT.	OPINION OF THIS COURT.
That on the 1st day of April, 1891, there existed in the County of King, State of Washington, taxable moneyed capital (other than and beyond that invested in shares of stock of national banks and beyond that invested in incorporated banks) owned by individuals citizens of said state resident in said county, and there invested in interest bearing loans, discounts and securities to them payable and owing by other citizens of said state residing in said county, of vast amount, to-wit, exceeding the sum of six million dollars.—Paragraph 12, Folio 5.	"The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed, is invested for that purpose in securities, by way of loan, discount or otherwise, which are, from time to time, according to the rules of the business, reduced again to money and re-invested. It includes money, in the hands of

That on said first day of April there existed in the State of Washington in counties other than the County of King aforesaid, other taxable moneyed capital (aside from the moneyed capital referred to in the paragraph immediately preceding, and aside from capital invested in incorporated banks) owned by citizens of the State of Washington resident in said state (in counties other than the County of King) and there invested in interest-bearing loans, discounts and securities to them payable and owing by other resident citizens of said state in counties other than the County of King, of vast amount, to-wit, exceeding the sum, as complainant is informed and believes, of twenty million dollars.—Paragraph 13, Folio 6.

That on the said first day of April the total capitalization of national banks located in the State of Washington was the sum of seven million dollars; that the total capitalization of banks there located, but incorporated under the laws of the State of Washington, was the sum of four million dollars, and that at the same time large amounts of moneyed capital were invested in the State of Washington by residents of said state in the stocks and bonds of insurance, wharf and gas companies, and in addition to the foregoing there then existed in said state individuals, employed in a similar way, invested in loans or in securities for the payment of money, either as an investment of a permanent character, or temporarily, with a view to sale or repayment or re-investment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

Mercantile Bank vs. New York, 121 U. S. 138.

other moneyed capital amounting to at least twenty-six million dollars, being the other moneyed capital hereinbefore referred to; that in no case as complainant is informed and believes, is the stock of any national bank or of shares of stock of any national bank located in the State of Washington, valued for assessment at a less sum or assessed upon a valuation of less than 85 per cent. of the par value thereof; and, further, that the total assessment and total valuation in the assessments throughout the State of Washington for the year 1891, of and upon the bonds and shares of banks, banking corporations, insurance, gas, and wharf corporations was the sum of eight million two hundred and five thousand five hundred and three dollars.—Paragraph 14, Folios 6–7.

That all of said other moneyed capital referred to in the foregoing paragraphs hereof numbered XII and XIII, the same being all the moneyed capital in the State owned by resident individual citizens and invested as aforesaid, in interest bearing loans, discounts and securities, except that owned by and invested in incorporated banks located in the State, was purposely omitted from assessment and from taxation whatsoever by each and every of the county assessors and other taxing of-

ficers throughout the State of Washington, and the same and the whole thereof have escaped taxation throughout the State of Washington. Paragraph 17, Folio 8.

It is apparent that the language of the complaint is identical with that found in the foregoing extract from the opinion of this Court.

The bill of complaint in the case of the Puget Sound National Bank vs. King County, *et al.*, 57 Federal Reporter, page 433, is practically identical with the language of the complaint in the case at bar. The Circuit Court of the District of Washington in overruling the demurrer to that bill, said:

"The bill does explicitly set forth the fact and the manner of discrimination against shareholders of national bank stock in the valuation thereof for assessment as compared with the assessment for the same year, of other moneyed capital in the hands of individual citizens of this state, and invested in the state, so as to make a profit from the use thereof as money."

* * * * * * *

"It is true that the bill in this case does not particularize the discriminations complained of or specify instances with any greater minuteness than the bill in the case of the First National Bank of Aberdeen vs. County of Chehalis, in which the Supreme Court of this State affirmed a judgment in favor of the defendant upon a demurrer to the bill. But it is also true that the bill before me is fully as definite and specific in its statement of the facts constituting discriminations as the bill in the case of Boyer vs. Boyer, *supra*, in which the Supreme Court of the United States held that an answer should have been required, and reversed the decision of the Supreme Court of Pennsylvania sustaining a demurrer to the bill."

That the moneyed capital omitted from taxation was other moneyed capital in the hands of individual citizens, within the meaning of Section 5219 of the Revised Statutes of the United States, is clear.

Mercantile Bank vs. New York, 121 U. S. 138.
Boyer vs. Boyer, 113 U. S. 689.
Talbott vs. Board of Commissioners, 139 U. S. 438.

Wasson vs. First Nat. Bank, 107 Ind 206.
Maguire vs. Board of Revenue, 71 Ala. 401.

That such omission resulted in the taxation of the shares in national banks at a rate greater than that imposed on other moneyed capital in the hands of individual citizens, is equally clear. This discrimination against shares in national banks violated Section 5219 of the Revised Statutes of the United States, and rendered the assessment void.

Boyer vs. Boyer, supra.
Mercantile Bank vs. New York, supra.
Supervisors vs. Stanley, 105 U. S. 317-318.
Pelton vs. National Bank, 101 U. S. 143.
Cummings vs. National Bank, 101 U. S. 153.
First National Bank vs. Lindsley, 45 Fed. Rep. 620.
Wasson vs. First National Bank, supra.
Puget Sound National Bank vs. King County, 57 Fed. Rep. 433.

The omission of the above amount of moneyed capital in the hands of individual citizens from assessment was premeditated and was the result of an agreement between the county assessors throughout the State. Folio, 10.

The tax to complainant was therefore void.

Andrews vs. King County, 1 Wash. 46.

This would be true even though the revenue law of this state forbade such omissions.

First National Bank of Toledo vs. Treasurer, 25 Fed. Rep. 749.
Yick Wo vs. Hopkins, 118 U. S. 356.

In concluding the discussion upon this proposition, the facts alleged in Paragraph 19 of the complaint are peculiarly pertinent. It appears therefrom that the omission worked the forbidden discrimination and necessarily increased the rate of taxation upon the shares of the plaintiff's capital stock, all of which was well known and most wrongfully intended by the taxing officers.

* * * * * * *

In conclusion it is submitted that no question has been made but that the remedy by which the plaintiff sought to obtain redress is the proper one. A suit in equity by the bank praying an injunction to restrain the collection of a tax and seeking a decree annulling the assessment, was the proper remedy in the case.

Cummings vs. National Bank, 101 U. S. 153.
Andrews vs. King County, 1 Wash. 46 (in which Cummings vs. National Bank is cited with express approval).
Hills vs. Exchange Bank, 105 U. S. 319 (affirming on this point, 5 Fed. 253).
Covington City National Bank vs. City of Covington, 21 Fed. 484.
First National Bank of Toledo vs. Treasurer, 25 Fed. Rep. 749.
First National Bank vs. City of Richmond, 39 Fed. Rep. 309.
National Bank vs. Kimball, 103 U. S. Rep. 732.
Virginia Coupon Cases, 114 U. S. Rep. 316.
Lenawee Co. Savings Bank vs. City of Adrian, 66 Mich. 273.
Osborne vs. Bank, 9 Wheaton, 739.
Howell vs. City of Tacoma, 3 Washington, 711.

* * * * * * *

It is therefore respectfully submitted that the judgment of the Supreme Court of the State of Washington should be reversed, and that that court should be instructed to reverse the judgment of the Superior Court of King County, State of Washington, sustaining the demurrer of the defendants to the plaintiff's complaint.

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HAROLD PRESTON,
JAMES B. HOWE,
Counsel for Plaintiff in Error.

166-463

Office Supreme Court, U. S.
JAN 12 1897
JAMES H. [illegible] CLERK.

166-463

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

No. 226.

WASHINGTON NATIONAL BANK OF SEATTLE, WASHINGTON, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF KING, IN THE STATE OF WASHINGTON, AND A. P. MITTEN, AS TREASURER AND EX-OFFICIO TAX COLLECTOR OF SAID COUNTY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF DEFENDANTS IN ERROR.

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Lowman & Hanford Stationery & Printing Co., Seattle.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

No. 226.

WASHINGTON NATIONAL BANK OF SEATTLE, WASHINGTON, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF KING, IN THE STATE OF WASHINGTON, AND A. P. MITTEN, AS TREASURER AND EX-OFFICIO TAX COLLECTOR OF SAID COUNTY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT.

The complaint of plaintiff in error, being the plaintiff in the original cause, alleges in effect that 1000 shares of the capital stock of plainttff in error, being the whole number of its shares, was assessed April 1, 1891, *in solido* to plaintiff in error as owner thereof at $110 per share, which was reduced by the Board of County Commissioners to $93.50 per share and the tax levied accordingly. That at that time in said county of King there was moneyed capital owned by citizens being residents of said county and invested in loans and securities owing by citizens being residents of said county in an amount exceeding six million dollars; that there was moneyed capital owned by residents of the rest of the state invested in loans

and securities owing by citizens being residents of the rest of the state, amounting to $20,000,000; that this moneyed capital of the county of King and of the State of Washington was omitted from assessment by reason of the concerted action of the county assessors of the state pursuant to the advice of the attorney general; that the capitalization of national banks in the state then amounted to $7,000,000, and of incorporated state banks to $4,000,000; that the moneyed capital of the state invested in the stocks and bonds of insurance, gas and wharf companies amounted to a sum which added to all the moneyed capital before mentioned made $26,000,000.

Plaintiff in error further alleges that its capital, surplus and undivided profits were invested partly in United States bonds, and the remainder in loans to residents of the state and in furniture and fixtures.

It avers that the treasurer of King county is about to distrain its property to secure said tax. It claims that the tax *in solido* is unlawful in method and that the omissions referred to effected a discrimination against the shares of plaintiff in error as a national bank forbidden by Sections 5214 and 5219 U. S. R. S.

Without tendering or offering to pay the amount of tax plaintiff in error ought to pay, it prays for an injunction against the collection of the tax.

To this complaint defendant in error demurred.

The Superior Court of King County sustained the demurrer, and, plaintiff in error electing to stand on its demurrer, gave judgment for defendants in error.

Thereupon plaintiff in error appealed to the Supreme Court of the State, which affirmed the judgment of the court below. From this judgment of affirmance this writ of error is prosecuted.

The statutes pursuant to which the tax in question was levied are Sections 21 and 23, ch. 140, Laws of Washington of 1891, pp. 289 and 290, and are as follows:

"Section 21. Every individual, firm, corporation or association of persons, carrying on a general banking business in this state, whether the same has been organized under the banking laws of this state or of the United States, or conducted under the style of private bankers, shall be assessed and taxed in the county, town, city or village where such bank or banking association is located and not elsewhere, in the following manner: Annually, at such times as provided for listing property for taxation, every such bank or banking association as contemplated in this section shall, by its accounting officer, furnish the county or city assessor a statement, verified by oath, giving the amount of paid-up capital stock, the amount of surplus or reserve fund and the amount of undivided profits of such bank or banking association. The aggregate amount of capital, surplus, and undivided profits shall be assessed and taxed as other like property in the state is assessed and taxed: Provided, at the time of listing the capital stock, the amount and description of its legally authorized investments in real estate shall be assessed and taxed under this act, and the assessor shall deduct the amount of such investments in real estate from the aggregate amount of such capital, surplus, and undivided profits, and the remainder then taxed as above provided."

Sec. 23. "Each bank and banking association shall be liable to pay any taxes assessed against them as the agent of each of its shareholders, owners or owner under the provisions of this act, and may pay the same out of their undivided profit account or charge the same to their expense account, or to the accounts of such shareholders, owners or owner in proportion to their ownership."

The opinion of the Supreme Court of Washington is found at 9 Wash. 607.

Plaintiff in errors contends—

1. That the sections of the Washington revenue law of 1891 above quoted are invalid since they provide for the taxing of the capital and property of the bank instead of shares of its stock.

2. That the manner in which the assessment complained of was made constituted it an assessment on the capital and property of the bank and not on the shares of its stock.

3. That the failure to assess the shares of gas and insurance and wharf companies effected a discrimination against shares in national banks.

4. That the omission to assess the other moneyed capital alleged, resulted in the taxation of the shares of national banks at a greater rate than is assessed on other moneyed capital in the state.

5. That the action of the taxing officers complained of, violated the provisions of the federal constitution forbidding states to deprive any person of life, liberty or property without due process of law or to deny any person the equal protection of the laws.

ARGUMENT.

I.

THE VIOLATION OF THE FEDERAL CONSTITUTION.

(*a.*) This point cannot be raised in this court not having been raised in the court below. The "title, right, privilege or immunity" contended for by the plaintiff in error was not "claimed under the constitution of the United States," and the decision of the court was not against a "title, right, privilege or immunity" so claimed.

Spies v. Illinois, 123 U. S. 131, 181.
French v. Hopkins, 124 U. S. 524.
Clark v. Pennsylvania, 128 U. S. 395, 397.
Morrison v. Watson, 114 U. S. 111, 115.
Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 540.

Even had the point been raised on a petition for rehearing, it would not be considered by this court.

Chappell v. Bradshaw, 128 U. S. 132, 134.
Texas Pacific R. Co. v. Southern Pacific R. Co., 137 U. S. 48, 53.
Caldwell v. Texas, 137 U. S. 692, 698.

Locher v. Schroeder, 149 U. S. 580, 585.
Bushnell v. Crooke M. & S. Co., 148 U. S. 682, 689.
Miller v. Texas, 153 U. S. 535, 538.
Sayward v. Denny, 158 U. S. 180.

Being raised for the first time on the assignment of errors, it cannot be considered by this court.

Ansbro v. United States, 159 U. S. 695, 698.

(*b.*) The fourteenth amendment to the federal constitution does not undertake to control the mode of imposing a tax if notice and an opportunity for a hearing are afforded.

Walston v. Nevin, 128 U. S. 578, 582.
Palmer v. McMahon, 133 U. S. 660, 668.
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 239.
Paulsen v. Portland, 149 U. S. 30, 41.
Pittsburgh, etc., R. Co. v. Backus, 154 U. S. 421, 427.

(*c.*) Nor does this amendment limit the taxing power of the state by imposing on it any rule of equality.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237.
Chester v. Pennsylvania, 134 U. S. 240.
Home Ins. Co. v. New York, 134 U. S. 594, 606.
Pacific Express Co. v. Siebert, 142 U. S. 339, 351.
Charlotte, etc., R. Co. v. Gibbes, 142 U. S. 386, 394.
Jennings v. Coal Ridge, etc., Co., 147 U. S. 147.
Giozza v. Tiernan, 148 U. S. 657, 662.

II.

THE STATUTORY PROVISION FOR THE TAXATION OF THE CAPITAL STOCK OF NATIONAL BANKS.

(*a.*) Sections 5214 and 5219 forbid the taxation of the capital and permit only the taxation of shares of stock of national banks.

Van Allen v. The Assessors, 3 Wall. 573.
National Bank v. Commonwealth, 9 Wall. 353, 359.

(*b.*) Sections 21 and 23, ch. 140, Laws of 1891, above quoted, as construed by our Supreme Court provide for the taxation of the shares only of national banks.

Paul v. McGraw, 3 Wash. 296, 303, 307.
First National Bank v. County of Chehalis, 6 Wash. 64.

An instance where words in a statute stating that *capital stock* is to be assessed are assumed to provide a tax on *shares* is found in

Newark Banking Co. v. Newark, 121 U. S. 163, at page 164.

(*c.*) This construction by the state court will govern this court.

People v. Weaver, 100 U. S. 539.
Palmer v. McMahon, 133 U. S. 660, 665.
First National Bank v. Ayers, 160 U. S., 660, 664.
Stryker v. Goodnow, 123 U. S. 527.
Morley v. Lake Shore & M. S. R. Co., 146 U. S. 162.

(*d.*) No federal question arises where the validity of the state statute is admitted.

Commercial Bank v. Buckingham, 5 How. 317, 342.
Banking Co. v. Marshall, 12 How. 165, 167.

No federal question arises when the exemption from taxation claimed under the federal law is sustained.

Tyler v. Cass County, 142 U. S. 288.

There can be no federal question therefore in this case where the state court construes the statutes as not providing for the taxation of bank capital which the federal law exempts from taxation, and as providing for the taxation of bank shares which the federal law permits to be taxed. If this court would ever depart from its rule of following the construction given to the statute of a state by its court of last resort, it surely would not violate the rule in order to give the state statute a construction that would render it invalid.

Baltimore Traction Co. v. Baltimore Belt R. Co., 151 U. S. 137.

(*c.*) The assessment of the shares against the bank and the collection of the same therefrom seems to have been contemplated by the framers of the federal statutes and has been repeatedly upheld by this court.

National Bank v. Commonwealth, 9 Wall. 353.
Lionberger v. Rouse, 9 Wall. 468.
Van Slyke v. Wisconsin, Bagnall v. same, 154 U. S. 581.
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 238.

In National Bank v. Commonwealth, 9 Wall. 353, the statutory tax of 50 cents per share was imposed in a lump sum of $4,000 on the bank, the statute nowhere providing for the reimbursement of the bank by the shareholders in any manner whatever.

The bank contended that the tax was practically a tax on itself and not on its shareholders. (9 Wall. 353, 361.)

But this court held that the tax was practically a tax on the shares and the shareholders, and not on the bank or its capital.

In Waite v. Dowley, 94 U. S. 527, this court held that this assessment of the tax against the bank was an illustration of the general rule of Section 5219 U. S. Revised Statutes, remitting the *method* of taxing bank shares to the states, which rule empowered the states to require bank cashiers to furnish to the tax officers of the state certificates containing information useful or necessary in order to ascertain the value of the shares and the residence of their owners.

So true is it that the payment by the bank of taxes on its shares is a payment of the shareholders' money that it was the duty of the bank to include the amount of such payments in the statement of its earnings on which, under the Act of June 30, 1864, an internal revenue tax was required to be paid.

Central National Bank v. United States, 137 U. S. 355, 363.

Plaintiff in error at page 6 of its brief, mistakenly cites City of Boston v. Beal, 51 Fed. Rep. 306, as supporting the doctrine that when the bank charges the tax paid to its expense account, the tax falls not on the shareholder but on the bank; but an examination of that case shows that the payment of the tax by the bank is practically a payment by its shareholders except when by reason of the insolvency of the bank, the payment by the bank causes the tax ultimately to fall on its creditors.

In this case no insolvency of the plaintiff in error is alleged. This court does not try moot cases whether the questions involved relate to the taxation of national banks or otherwise.

Waite v. Dowley, 94 U. S. 527, 534.

Plaintiff in error at page 7 of its brief accuses the Supreme Court of Washington of confounding the method of collection with the power to assess. It will be observed that if that court is guilty as charged it is so in company with this court when it decided National Bank v. Commonwealth, 9 Wall. 353, where the statute, the tax under which was upheld, provides only for assessment of the tax against and payment by the bank and ignores the shareholders altogether.

(*f.*) The tax on the shares may be collected from the national bank by distraint.

First National Bank v. Douglas County, 3 Dillon 330, 334.
National Bank v. Morrison, 1 McCrary, 204.

III.

THE LISTING IN SOLIDO BY THE ASSESSOR.

(*a.*) This listing being in compliance with the statutes and approved by the Supreme Court of Washington was valid.

(*b.*) The listing of the shares alleged in the complaint shows that the tax was imposed on the shares and not on the capital.

The allegation in the complaint (par. 5 f. 3.) is that the assessor "did list to the complainant as owner thereof, one

thousand shares of complainant's capital stock, valuing the same for the purposes of assessment and taxation thereunder at the rate of $110.00 per share, and did list the same *in solido* to complainant as owner thereof at a total valuation of $110,000.00."

It appears, therefore, by the allegations of the complaint, that the assessment was not *in solido* at all, the use of that expression being simply the pleader's characterization of the facts antecedently alleged, namely, that one thousand shares of complainant's capital stock was listed to the complainant.

The true meaning of the expression "*in solido*," is an assessment of the CAPITAL STOCK of the bank, as such, as distinguished from an assessment on the shares.

Conceding as claimed by plaintiff in error, that national banks and the shares thereof may be taxed by the state only, to the extent granted by federal legislation, we fail to find any provision of law or any decision of this Court which even intimates that it is unlawful to list or assess the shares in the name of the bank.

The case of National Bank v. Commonwealth, 9 Wall. 353, bears directly on this point. That decision fully sustains the position that the shares may be listed and assessed directly against the bank as the agent of its share-holders.

A careful examination of section 5219 Revised Statutes U. S., makes it plain that Congress intended that the taxes on the shares should be collected by proceedings against the share-holders' interest in the bank itself. That section provides:

"The legislature of each state may determine and direct the manner and place of taxing all the shares of National Banking Associations within the state, subject only to the two restrictions; that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any National Banking Association owned by non-residents of any state shall be taxed in the city or town where the bank is located and not elsewhere."

It will be observed in the first place, that the manner of taxing the shares is left entirely to local legislation. The word "manner" can mean nothing but the mode of listing and assessing the property and collecting the tax. In the second place, the taxes and shares of non-residents are to be taxed WHERE THE BANK IS LOCATED, AND NOT ELSEWHERE. By what possible means can a tax be collected on the shares of non-residents except by making the stockholders' interest in the bank liable therefor by some kind of proper legislation?

The provisions of this section in relation to taxation of shares of non-residents, seem to have been entirely overlooked in the cases cited by appellant, namely:

First National Bank v. City of Richmond, 39 Fed. 309.
National Bank v. City of Richmond, 42 Fed. 877.

On the point, therefore, of the claimed assessment "*in solido*," we say that no assessment "*in solido*," properly so-called, is alleged, and the mode of the assessment as alleged is the mode approved by this court.

The shares of national banks are not aliquot parts of its capital, but are themselves a distinct species of property.

Exchange Bank v. Miller, 19 Fed. 372.

In arguing this proposition, counsel for plaintiff in error assumes that because property is listed to or in the name of the bank, it necessarily follows that it is the proprietary interest of the bank which is assessed. Such is not the case. The manner of making up an assessment roll is a thing usually regulated by law, and by section 5219 the federal government leaves the mode of making up the roll to the determination of the state legislature. Such laws usually provide in what name property shall be assessed. By the revenue law of 1891 real property was not assessed in the name of any person.

Revenue Law of 1891, Section 45.

By section 8 of the same law, property of a minor child is listed in the name of the guardian, or the person having such property in charge; the property of an idiot or lunatic is listed by the person having charge of the property; the property of a person for whose benefit it is held in trust, by the trustee, executor or administrator; the property of corporations whose assets are in the hands of receivers, by such receivers or their agents; money and property in litigation in the possession of any county officer must be assessed to the custodian thereof and the taxes thereon paid by the custodian.

Many other similar provisions are common in all tax laws, and it is entirely erroneous to assume, because the shares are listed and assessed in the name of the bank, that the proceedings amount to a tax against the bank. As well might guardians and receivers claim that they are entitled to relief against similar assessments.

(*c.*) Section 23, above quoted, makes the bank the agent of the shareholders in paying the tax. This statutory agency of the bank can in no wise be affected by the listing of the shares in the name of the bank. Since the bank pays the whole tax as agent of the shareholders, the names of the shareholders are not necessary to the assessment or collection of the tax, and it is even held that for this reason the furnishing of a list of the shareholders by the cashier to the assessor cannot be compelled.

Paul v. McGraw, 3 Wash. 296.

(*d.*) The Supreme Court of the state having held the action of the assessor to be authorized by the statutes as above construed, there is no federal question.

Sage v. Louisiana Board of Equalization, 144 U. S. 647.

The taxation of the capital of a corporation where its value is ascertained by multiplying the number of shares by the market value of each share is practically equivalent to the

taxation of shares at their market value, where no deductions for indebtedness are allowed.

Mercantile Bank v. New York, 121 U. S. 138, 164.

The cases cited by plaintiff in error (on page 8 of its brief), as holding assessments *in solido* invalid are cases in all of which the capital and not the shares were assessed. Also in all these cases except Collins v. Chicago, 4 Bissell, 472, it appears that the state law permitted deductions on account of indebtedness, of the benefit of which deductions, the shareholders were deprived by such assessment. Furthermore, in First National Bank of Leoti v. Fisher, 45 Kan., 726, and Miller v. First National Bank, 46 Ohio St. 424, it appears that the state statute expressly requires the listing of the shares in the name of the shareholder.

Since in this case the assessment was of the *shares* and not of the *capital*, since the revenue law of Washington for 1891, allowed no deductions for indebtedness for purposes of assessment or taxation, and since the same law did not require the assessment of the shares in the names of the shareholders, the cases cited have no bearing on the case at bar.

Plaintiff in error at page 9 of its brief mistakenly says, that in National Bank v. Commonwealth, 9 Wall., 353, the assessment had been made against the stockholders. On the contrary the assessment was a statutory tax of 50 cents per share, assesssed against the bank in one sum of $4,000, and the shareholders were not referred to or considered, either in the tax proceedings or in the Kentucky statutes providing for the tax.

Plaintiff in error further contends that the doctrine of National Bank v. Commonwealth, 9 Wall., 353, applies only when suit (in the nature of garnishment) is brought against the bank for the tax and not when the collection of the tax is sought to be enforced by distress, and that Hershire v. First National Bank, 35 Iowa, 272 points out the distinction. On the contrary Bank v. Commonwealth approves the collection of the tax from the bank as a method of collecting from the

shareholder, however that collection against the bank may be enforced. It nowhere sets limits by even the remotest implication to the mode of collecting from the bank.

Furthermore, Hershire v. First National Bank was itself an action against a bank for a tax, and the court held that under the Iowa Statute compelling the bank to pay as agent of the stockholders, and the statute requiring an agent to pay taxes for his principal only when he has funds of the principal under his control, in an action to recover the tax from the bank the complaint must allege the existence under the control of the bank of funds of its stockholders.

By a parity of reasoning in this case the plaintiff in error should have alleged in its complaint that it had no funds of stockholders under its control such as surplus, undivided profits or dividends.

IV.

THE FAILURE TO ASSESS STOCKS OF NON-BANKING CORPORATIONS.

The discrimination forbidden by the federal statute is a discrimination as regards "other moneyed capital," not as regards other personal property, or shares of the capital stock of corporations not engaged in the banking business. The exemption of property not "moneyed capital" from taxation, or the taxation of such property at a lower rate than "moneyed capital" causes no "taxation at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."

First National Bank v. Waters, 7 Fed. Rep. 152.
McMahon v. Palmer, 102 N. Y. 176.
People v. Commissioners, 4 Wall. 244.
Mercantile Bank v. New York, 121 U. S. 138.
Palmer v. McMahon, 133 U. S. 660, 667.
Talbot v. Silver Bow Co., 139 U. S. 438.

It is contended by plaintiff in error that it appears by the complaint that six million dollars of money capital has escaped assessment and taxation in King County, and therefore the assessment and taxation of the shares of the national banks was void.

A careful examination of the allegations of the complaint in the light of the decisions of this court upon this subject will show that there is no allegation that "taxable moneyed capital" has been exempted in such a manner as to amount to discrimination against the shares of national banks. The first decision of this court bearing directly upon this point was that of "Hepburn v. School Directors, 23 Wall. 480."

The question there involved was whether the exemption from local taxation of mortgages, judgments, recognizances and moneys due upon agreements for the sale of real estate in the hands of individuals was so substantial in its nature and operation as to affect the integrity of a general assessment for local purposes. In holding that this exemption did not amount to any discrimination against national banks, the court said:

"This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it."

It is the established law, therefore, that the exemption of mortgages and the debts represented thereby, is a just exemption made to avoid double taxation, and is no discrimination.

The complaint does not allege that the moneyed capital which is invested in loans, discounts and securities, was anything more than *mortgage debts*.

The plaintiff in error not having negatived the proposition that this moneyed capital is and was mortgage debts, it must be assumed that such was the fact, and that the full amount of this capital has been properly taxed by the taxation of the property mortgaged.

In the case of Boyer v. Boyer, 113 U. S. 689, cited by plaintiff in error, the court found that an illegal discrimination

resulted from the laws of Pennsylvania, and on this point the courts say:

"The burden of county taxation imposed by the latter act has at all events been removed from all bonds or certificates of loan issued by any railroad company incorporated by the state; from shares of stock in the hands of stock-holders of any institution or company of the state which in its corporate capacity is liable to pay a tax into the State Treasury under the act of 1859; from mortgages, judgments and recognizances of every kind; from money due or owing upon articles of agreement for the sale of real estate; from all loans, however made, by corporations, which are taxable for state purposes, when such corporations pay into the State Treasury the required tax on such indebtedness."

It will be observed that this exemption is much broader than as stated in plaintiff in error's brief, as it includes much in addition to "mortgages, judgments and recognizances."

In the late case of Mercantile Bank v. New York, 121 U. S., 138, the case of Boyer v. Boyer is greatly modified, while that of Hepburn v. School Directors is expressly approved.

It appears from the case of Mercantile Bank v. New York that a state can legitimately exempt deposits in savings banks, though amounting to enormous sums, municipal bonds of large amount, and shares of stock in trust companies, the companies themselves being subject to another tax. The courts say:

"The main purpose, therefore, of Congress in fixing the limits to state taxation on investments and the shares of national banks was to render it impossible for the state in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

And further:

"The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its busi-

ness is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loans, discounts or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans or in securities for the payment of money, either as investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

It will be seen by the foregoing quotation that it is the use of money for the purpose of making a profit by its use as money, when the same is carried on as a business, that constitutes moneyed capital within the meaning of the law. It will be further seen that in this very exhaustive definition of moneyed capital, in which every word and clause seems to have been selected with the greatest desire for accuracy and plain statement, the word "mortgage" is carefully excluded. In connection with this fact it is worthy of consideration that near the close of the opinion, again referring to the cases of Hepburn v. School Directors and Adams v. Nashville (in which last case the court held that municipal bonds could properly be exempted without exempting national bank shares,) the court proceeds:

"The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason and not operate as an unfriendly discrimination against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals in the shape of deposits in savings banks as now organized, which the policy of the state exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation."

Reading, then, the language of the complaint in the light of the exhaustive definition of this court, we find:

First. The complaint in this case, unlike the complaint in other cases which have been before this court, does not state any facts bringing to the knowledge of the court any exemption of moneyed capital. The use of the term "moneyed capital" in the complaint, is a mere legal conclusion. The pleader should state specifically the property omitted from taxation.

Second. It does not appear but that the moneyed capital exempted consisted of deposits in savings banks or other matter exempted, which as above noticed, the state had a right to exempt.

Third. It does not appear but that all the loans, discounts, and securities were simply mortgage debts, which as above noticed, the state had a right to exempt.

Construing together the decisions in Hepburn v. School Directors, and Mercantile Bank v. New York, there can be no doubt, we think, but that this court wishes it plainly understood that it is not necessary to impose a double burden of taxation upon mortgaged property in order to require National Bank shares to pay their proper portion of the public expenses.

V.

THE OMISSION TO TAX PERSONAL CREDITS.

(*a.*) This omission is alleged in the complaint to have been made pursuant to an opinion of the attorney general duly rendered, of which opinion the Supreme Court of Washington took judicial notice.

First National Bank v. Chehalis County, 6 Wash., 64, 70.

In this opinion the attorney general held that with the exception of credits of banks and bankers, brokers and stock jobbers, bonds, bank stocks and stocks other than bank stock, "credits" were exempt from taxation.

Opinions Attorney General, 1891, p. 59.

These exempted credits consisted mainly of accounts, promissory notes and mortgages.

First National Bank v. Chehalis County, 6 Wash. 64, 70.

It thus appears that the exempted credits consisted in part of "moneyed capital" and in part of other choses in action.

It also appears that while some "moneyed capital" was exempt, such moneyed capital as consisted of credits of banks and bankers, brokers and stock jobbers, of bonds, of corporate stocks, or of cash or bullion, were not exempt at all.

Sec. 3, 4, 16, 21, 22, 23, ch. 140, Laws of Wash. 1891, pp. 281, 282, 285, 289, 290.

(*b.*) This court has repeatedly held that the federal inhibition of taxation that discriminates against national banks has no application to general exemption laws founded on just reason and not operating as an unfriendly discrimination against investments in national bank shares.

People v. The Commissioners, 4 Wall. 244.
Hepburn v. School Directors, 23 Wall. 480.
Adams v. Nashville, 95 U. S. 19.
Mercantile Bank v. New York, 121 U. S. 138, 161.
Bank of Redemption v. Boston, 125 U. S. 60, 68.

1. The exemption of credits in this case subserves the purpose of preventing double taxation.

Opinions Attorney General, 1891, p. 39.

Such a purpose is recognized by this court as a legitimate basis for an exemption law, though some moneyed capital is thereby rendered exempt.

Hepburn v. School Directors, 23 Wall. 480.

2. The exemption in question is not an unfriendly discrimination against national banks. The exemption is of certain classes of credits. Only a small fraction of the exempt credits was embraced in the term "moneyed capital;" only a

small fraction of "moneyed capital" was comprised in the exempt credits. The consequence could not be, either in intent or effect, an unfriendly discrimination against national banks.

"Necessarily there may be other moneyed capital in the locality than such as is exempt. If there is, moneyed capital as such is not exempt. Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

Hepburn v. School Directors, 23 Wall. 480, 485.

3. Under the revenue law of 1891, both the assets and shares of non-banking corporations in Washington are taxable.

Secs. 3, 20 and 21, ch. 140, Wash. Laws, 1891, pp. 280, 289.
Sec. 16, Id. (item 23 in list).

The assets of national banks consisting largely of promissory notes are exempted from taxation by the federal law. The exemption in question gives to the residents and corporations of the state the benefit of a portion of the exemption enjoyed by national banks.

4. The exemption in question does not affect capital engaged in the banking business. State banks in Washington are assessed in the same manner as national banks.

Secs. 21 and 23, ch. 140, Wash. Laws, 1891, pp. 289, 290.

Private and foreign bankers are assessed in the full amount of the money used in their business.

Sec. 22, ch. 140, Wash. Laws, 1891, p. 290.

Banks, bankers, brokers and stock jobbers are required to list for taxation all their credits.

Sec. 16, ch. 140, Wash. Laws, 1891, p. 286 (item 21).

It is apparent, therefore, that the exemption in question does not, in the language of Justice Matthews, in Mercantile Bank v. New York, 121 U. S. 138, 155, "create and foster an

unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character."

Bressler v. Wayne, 32 Neb. 834, 843.

Compare Van Allen v. Assessors, 3 Wall., 573, with People v. Commissioners, 4 Wall., 244.

5. The capital represented by shares in national banks is largely engaged in dealing in credits that are within the exemption in question. The capital employed in the business of dealing in exempt property should not itself be exempt. It is no discrimination, therefore, against shareholders of national banks to exempt, in addition to accounts, promissory notes and mortgages in buying and selling and holding which their capital is used.

6. The exemption in question besides diminishing double taxation, served to encourage thrift and savings. The exception of banks and bankers from this exemption is in harmony with this purpose, since the encouragement of thrift among the people in general does not require the extension of the exemption to banks and bankers, brokers and stock jobbers.

The exemption of savings bank deposits being an exemption of moneyed capital that does not compete with the business of national banks and being founded in reason, causes no discrimination against shares in national banks though such savings in the state amount to $500,000,000 and upwards.

Mercantile Bank v. New York, 121 U. S., 138, 160.
Bank of Redemption v. Boston, 125 U. S., 60, 68.

(c.) The question of the sufficiency of pleadings to present a matter for determination is one of state law and involves no federal question.

Grand Rapids & I. R. Co. v. Butler, 159 U. S., 87, 91.
Moore v. Missouri, 159 U. S., 673, 678.
Caldwell v. Texas, 137 U. S. 692, 698.

Iowa Central Railway Co. v. Iowa, 160 U. S. 389, 393.
Leeper v. Texas, 139 U. S., 462, 468.

This being an independent ground of decision, not involving a federal question, and broad enough to support the judgment of the state court, the writ should be dismissed.

Williams v. Weaver, 100 U. S., 547.
Rutland R. Co. v. Central Vermont R. Co., 159 U. S. 630, 640.

In any case the complaint fails to show that the moneyed capital exempted from taxation was of such character or was in such considerable quantity as regards the total moneyed capital of the state and such as was invested in shares of national banks as to affect any actual discrimination.

First National Bank v. Ayers, 160 U. S., 660, 667.
Dutton v. Bank, 53 Kan., 440, 461.

The exemption of an amount of moneyed capital large in itself but small relatively to the whole amount of moneyed capital cannot be deemed an unfair discrimination.

Mercantile Bank v. New York, 121 U. S., 138, 161.

The complaint further fails to show whether the moneyed capital alleged to have been exempted was in the hands of individual citizens of the state. The exemption of moneyed capital in the hands of corporations is no discrimination against shares in national banks.

Mercantile Bank v. New York, 121 U. S., 138, 156.
Bank of Redemption v. Boston, 125 U. S. 60, 68.

Plaintiff in error complains that the average assessment of shares of national banks stock was $85 while that of state banks stock was less than $57 per share. No showing is made as to the relative average value of the respective shares.

Furthermore, there is no allegation that the difference in the assessment, if prejudicial, was due to any unfair provi-

sion of law or rule of assessment. Such an averment is necessary to render the complaint good on demurrer.

National Bank v. Kimball, 103 U. S., 732, 735.

Plaintiff in error argues that the exemption of credits alleged, subjects its shares to a tax that is *excessive* whether void or not.

For any erroneous or excessive taxation it had ample and complete remedy by making application to the county board of equalization, which it did not do.

Sec. 68, Ch., 140, Wash. Laws 1891, p. 304.
Stanley v. Supervisories of Albany, 125 U. S., 535, 551.

If the excessive tax was so imposed as to enable a court of equity to interfere, plaintiff should have paid or tendered the tax rightfully due.

State Railroad Cases, 92 U. S., 575, 6, 6.
Cummings v. National Bank, 101 U. S., 153.
National Bank v. Kimball, 103 U. S., 732.
Albuquerque Bank v. Perea, 147 U. S., 87, 90.

This rule prevails in Washington.

Andrews v. King County, 1 Wash. 46, 54.

A State statute forbidding deduction from bank shares that are allowed generally from credits is not *void*, it is simply inoperative as to persons entitled to deductions.

Supervisors v. Stanley, 105 U. S., 305.

By a parity of reasoning the tax is not void if a discrimination exists, it is inoperative to the extent of the excess caused by the discrimination and the remainder should be paid or tendered.

Defendants in error therefore believe that they may fairly ask this court to hold—

1. That the decision of the Washington Supreme Court that the complaint was too vague and indefinite to allege sufficient-

ly a discrimination against the shares of the plaintiff in error involved no federal question and was broad enough to support its judgment, and hence that the writ of error should be dismissed.

2. That the complaint does not sufficiently allege a discrimination against the shares of the plaintiff in error in the matter of taxation.

3. That the statutes of Washington as construed by its supreme court provide for the taxation of the shares and not the capital of national banks, and that the collection of the tax from the banks is valid.

4. That the assessment in this case was of the shares and not of the capital of the plaintiff in error.

5. That the exemption of the credits specified neither contemplated nor effected a discrimination against shares of National Banks.

6. That the federal constitution has not been violated by the taxing officers of the state, and no right claimed thereunder has been denied by the Washington courts.

Respectfully submitted.

JAMES A. HAIGHT,
ANDREW F. BURLEIGH,
SAMUEL H. PILES,
Counsel for Defendants in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~558~~. 242

THE AMERICAN PUBLISHING COMPANY, PLAINTIFF IN ERROR,

vs.

A. FISHER AND AARON KEYSER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF A. FISHER BREWING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED MARCH 11, 1895.

(15,823.)

(15,823.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 553.

THE AMERICAN PUBLISHING COMPANY, PLAINTIFF IN ERROR,

vs.

A. FISHER AND AARON KEYSER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF A. FISHER BREWING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

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1 In the District Court of the Third Judicial District of the Territory of Utah, County of Salt Lake.

AMERICAN PUBLISHING COMPANY, Plaintiff,
vs.
A. FISHER and AARON KEYSER, Copartners, Doing Business under the Firm Name of A. Fisher Brewing Company, Defendants.

The plaintiff above named complains of the above-named defendant- and alleges:

First. That the plaintiff is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Wisconsin.

Second. That at all the times hereinafter mentioned the defendants were and ever since have continued to be and now still are copartners together in business under the firm name and style of "A. Fisher Brewing Company."

Third. That heretofore at Salt Lake City, in the Territory of Utah, on or about the 28th day of March, 1890, the said plaintiff and defendant- entered into an agreement in writing, in words and figures as follows, to wit:

"MARCH 28TH, 1890.

"A. Fisher Brewing Company, Salt Lake City, Utah.

"GENTLEMEN: Will submit sketch for your trade-mark with sketch for your bottle labels also submitting finished proofs of plates, and will furnish you with one and one-half (1½ million) million labels in the course of a year after the proofs have been made, in black and bronze, with trade-mark inserted, at fifty-five cents (55c.) per M labels, and will duplicate this first year's shipment in each of the following five years at same rate after the expiration of this first year. Will also submit six different kinds of sketches for small advertising cards on style of cards submitted, printed in colors in front and black on back, furnishing you with 50 M of each kind of cards after sketches have been submitted as soon as ready at $9.75 per M cards. We shall also insert your trade-mark and compliment card on your edition of the panoramic view of Salt Lake City, and will furnish you with 10 M copies of said Salt Lake City view with trade-mark inserted after sketch of trade-mark has been submitted to you, as soon as ready, at 97c. per copy (ninety-seven cents) *per copy* of said view. Will attend to the application for registration of your trade-mark for you, and will submit designs for your different stationery headings and for a hanger in course of a year, with your trade-mark embodied on same furnishing you with 10 M

2 hangers, and 10 M of each kind of the following stationery, as soon as ready, viz: Letter-heads 8½ x 11, letter-heads 8½ x 5½, note-heads 5½ x 8½, statements 5½ x 8½, bills 8½ x 7, business cards and envelopes. Will also send you proof of bock card submitted in spring 1891. Price of hangers and price of bock cards, in

colors, is 37½c. apiece (all prices are made on goods at our office at Milwaukee) with your name and trade-mark inserted and will furnish you 300 bock cards for the season of 1891. Terms, cash on delivery.

"Very truly yours,

"AMERICAN PUBLISHING CO. OF MILWAUKEE, WIS.,

"Per A. E. COTZHAUSEN, *Treas.*

"All terms and conditions included in above approved; read and agreed.

"A. FISHER BR'Y CO.

"A. FISHER."

(Signed in duplicate.)

Fourth. That after making said agreement the plaintiff duly submitted to the defendants each and all of the sketches therein referred to; also duly attended to application for trade-mark for said defendants, and advanced twenty-five dollars for defendants on account thereof; also submitted the design for the stationery as in said agreement provided; also submitted design for hanger, with trade-mark embodied in the same, and proof of bock card, as in said agreement provided. Also inserted compliment card on panoramic view of Salt Lake City with said trade-mark inserted as in said agreement provided; that after making said sketches, designs, trade-mark, compliment card and all other preliminary things as in said agreement provided, and after the same were thereupon duly submitted to the said defendants, the said defendants duly endorsed and approved the same and each of them. That thereupon, after such approval, the said plaintiffs, at the instance of said defendants, and in pursuance of said contract, duly caused each and all of the various articles mentioned and specified in said agreement, and approved by said defendant-, to be made and produced in strict accordance with the terms and conditions of the said contract, and the approval and ratification of the said defendants as such copartners, and the same to be delivered to said defendant- under and in pursuance of the terms of said contract or agreement and the request of said defendants, except only the labels to be delivered during the period of five years succeeding the first year's delivery as provided by said contract.

Fifth. That said plaintiff has duly performed all the conditions of said contract or agreement on its part to be performed, as aforesaid, except only the delivery of the labels to be furnished in
3 each year for five years following the first year's delivery, as provided by said contract as aforesaid. And, that by reason of the premises the said defendants became indebted to the plaintiff in the sum of eighteen thousand three hundred and eighty-four dollars and seventy-five cents ($18,384.75), no part of which has been paid.

Sixth. Plaintiff further alleges that heretofore on or about the first day of March, 1891, the said defendants notified said plaintiff

not to furnish the balance of said labels contracted for by the said defendants for delivery during the five years following the first year's delivery as aforesaid. That the price of said labels, as per the terms and condition of said contract and acceptance and approval was made on the basis and in consideration of an order for nine million labels, and that the said plaintiff, after the approval of said labels by said defendant-, prepared to carry out said contract on its part to furnish and deliver all of said labels at the time and times, and in the manner and for the price agreed upon, as aforesaid. That after having delivered to defendants one million and five hundred thousand (1,500,000) labels within one year after proof of same had been submitted to and approved by defendants under said contract, the said defendants directed said plaintiff to cease further manufacture and shipment of said labels. That the actual loss sustained by the plaintiff in not being permitted to carry out and fulfill the said contract in respect to furnishing said defendants with one million, five hundred thousand (1,500,000) labels for each of the five years succeeding the first year's delivery, is the sum of twenty-four hundred and sixty dollars ($2,460) no part of which has been paid.

Seventh. That plaintiff has demanded from said defendants payment of said sum of eighteen thousand, three hundred and eighty-four dollars and seventy-five cents ($18,384.75) and also said sum of twenty-four hundred and sixty — ($2,460), and that the defendants have not paid the same or any part thereof, and that there is now due and owing from said defendants to said plaintiff the sum of twenty thousand, eight hundred and forty-four dollars and seventy-five cents ($20,844.75) with interest from April 1st, 1891.

Wherefore, the plaintiff demands judgment against said defendants for the sum of twenty thousand, eight hundred and forty-four dollars and seventy-five cents ($20,844.75), with legal interest thereon, as aforesaid, together with the costs and disbursements of this action.

CHAS. C. DEY,
Plaintiff's Attorney.

(Verification.)

Endorsed: Title of court and cause. Filed April 29, 1891. Henry G. McMillan, clerk.

4 Title of Court and Cause.

Answer.

Now come said defendants and for answer to the complaint herein—

Deny that the plaintiff is or at the time mentioned in the complaint was a corporation. This denial is based upon the ground that said defendants have no information or belief sufficient to otherwise enable them to answer said allegation.

Defendants further deny that at Salt Lake City, in the Territory of Utah, on the 28th day of March, 1890, or at any other time or

place, the said plaintiff and the said defendants or either of them entered into the agreement set forth in said complaint or into any agreement whatever, or that the said alleged written agreement was ever executed and delivered or intended by the said parties or either of the- to take effect as an agreement or contract.

Defendants further deny that after the making of said alleged or any agreement plaintiff duly submitted to the defendants each or all or any of the sketches therein referred to or duly or at all attended to application of trade-mark for said defendants or advanced $25 or any other sum for defendants' account or submitted design thereof of the said or any stationary, as in said alleged agreement provided, or submitted design for hanger with trade-mark embodied in the same, or proof of bock card, as in said alleged agreement provided, or inserted compliment card or panoramic view of Salt Lake City, with said trade-mark inserted, as in said alleged agreement provided, or that after making said sketches, designs, trade-mark, compliment cards, or any or all preliminary things, as in said agreement provided or otherwise, or after the same was duly or at all submitted to the said defendants, the said defendants duly or
5 at all approved the same or each or any of them, or that thereupon, after such alleged approval or at all, the said plaintiff, at the instance of the said defendants or in pursuance of said or any contract, duly or at all caused each and all the various articles mentioned or specified in said alleged agreement or otherwise or approved by said defendants to be made or produced in strict or any accordance with the terms or conditions of the said alleged contract or any contract or the approval or ratification of the said defendants or either of them, or as such copartners or otherwise, or the same to be delivered to said defendants or either of them under or in pursuance of the terms of said alleged contract or agreement or any contract or agreement or at the request of said defendants or either of them or at all.

Said defendants further deny that any labels were to be delivered by said plaintiff to said defendants during the period of five years succeeding the first year's delivery or any delivery or during any time or at all, as provided in said alleged contract or otherwise.

Defendants further deny that said plaintiff has duly or at all performed all or any of the conditions of the said alleged contract or agreement on its part to be performed as alleged or otherwise, or that any labels were to be furnished in each year for five years following the first year's delivery, as provided in said contract or at all, or that by reason of the premises or otherwise the said defendants or either of them became or are indebted to the plaintiff in the sum of $18,384.75 or in any sum whatever.

Defendants further deny that the defendants notified said plaintiff not to furnish the balance of any labels contracted for by the said defendants for delivery during the five years following the first year's delivery as aforesaid, and deny that any contract was ever made for any delivery of labels whatsoever; but said defend-
6 ants allege that when certain labels and other stationary were shipped to said defendants without their order or con

sent and not in pursuance of any agreement or contract they did immediately notify and advise the plaintiff that they refused to accept and receive the same and would not pay therefor, and held the same subject to plaintiff's orders.

Defendants further deny that the price of said labels as per the terms and conditions of said alleged contract or any contract or agreement or acceptance or approval was made on the basis or in consideration of an order for nine million labels or any number of labels whatever, or that the said plaintiff, after the alleged approval of said labels by said defendants or otherwise, prepared to carry out said or any contract on its part to furnish or deliver all or any of the said labels at the time or times or at any time or in the manner or for the price agreed upon or otherwise, or that after having delivered to defendants one million and five hundred thousand (1,500,000) labels or an- number of labels whatever within one year after the approval of the same had been submitted to or approved by said defendants under said contract or otherwise, said defendants directed said plaintiffs to cease the further manufacture and shipment of said labels; and defendants allege that when advised that said plaintiff- had shipped or were about to ship to them certain large quantities of stationary of different descriptions without their consent and not in pursuance of any agreement and without any order from them, that they did immediately notify the said plaintiff that they would not receive or pay for the same and would hold the same subject to its order; that said defendants did also notify said plaintiff not to manufacture or ship to them any more stationary of any description whatever.

7 Defendants further deny that the actual or any loss sustaine- by the plaintiff in not being permitted to carry out or fulfil the said alleged contract or any contract in respect to furnishing said defendants with one million five hundred thousand labels or any number of labels for each of the five years succeeding the first years' delivery or otherwise is the sum of $2,460 or any sum whatever.

Defendants further deny that there is now or was at any time due or owing from said defendants to said plaintiff the sum of $20,844.75, with interest from April first, 1891, or any sum whatever.

For a further answer to said complaint, said defendants allege: that on the 30th day of March, 1890, the same being the first day of the week, commonly called Sunday, one Cotzhausen called upon the defendant, Albert Fisher, in Salt Lake City, in the Territory of Utah, and represented that he was traveling as the agent of the American Publishing Company and solicited from the said defendant an order for certain kinds of stationery to be used in the business of the said defendants. That the said defendant then and there declined to make any order or enter into any agreement for the purchase of any stationery or other articles from the said company or through the said Cotzhausen as its agent. That the said Cotzhausen thereupon with intent to deceive and defraud said defendants, falsely and fraudulently represented to the said defendant that according to the rules and directions of the said American Publish-

ing Company to its traveling agents it was incumbent upon him, the said Cotzhausen, to make a proposition to the firms or persons in the different localities in writing and procure the endorsement of said firms and individuals upon such proposition in order that he might show the same to the American Publishing Company as an evidence to said company that the said firms had been called upon, and their patronage solicited by him, the said Cotzhausen, as the traveling agent of the said company. That thereupon the said Cotzhausen on the Sunday aforesaid, did reduce to writing certain proposals or propositions and at the solicitation of the said Cotzhausen, and induced by the representations so made, and further that the writing of the name of the firm of the said defendants upon said proposition was not designed nor intended in any manner to take effect as an agreement or to be construed as an acceptance of the proposal so made, or in any manner intended to bind the said defendants or either of them to take the goods according to
8 said proposal or any of them, the said defendant Albert Fisher did endorse upon the back of said written proposal the name of said firm. That said endorsement was not made nor was the said paper so endorsed or delivered with the intention or understanding of any of said parties, that the same should in any manner take effect as an agreement, or to be in any manner binding upon either of the parties thereto.

Said defendants further allege, that after said endorsement was made certain alterations and interlineations were fraudulently inserted and written upon the said paper and above the signature of said defendants, without their knowledge or consent, so as to give the said paper more the appearance and effect of a formal contract entered into by and between said plaintiff and the said defendants.

That the said proceedings on the part of the said plaintiff, and the said Cotzhausen were a part of a general scheme conceived by the said plaintiff and its officers and agents for the purpose of deceiving and misleading said defendants, by which successful fraud might be perpetrated upon them and the said defendants be thereby cheated out of large sums of money, and for the purpose of carrying said deception and fraud into successful operation said plaintiff had caused itself to be organized into a pretended corporation under the name of the American Publishing Company; said corporation, as defendants are informed and believe, and so allege the fact to be, being without property or assets of any description, and wholly irresponsible to any person who might have claims for damages against it.

That said American Publishing Company co-operated with another company or corporation, whose place of business is located at the same town as that where the said plaintiff is located, and pretends to do business, the said other corporation or company being known as the Beck & Pauli Lithographing Company.

That subsequently to the time when the said defendants endorsed the name of their firm upon their written proposal made by the said Cotzhausen as aforesaid, the said last-named company forwarded certain sketches to the defendants pretending that they were

merely samples submitted for the inspection and approval of the said defendants, and soliciting said defendants to endorse the same if the work to them seemed to them to be satisfactory.

That said defendants, not knowing that this was a part of a general scheme to defraud them, and wholly unaware of the connection between the said American Publishing Co. and the said Beck & Pauli Lithographing Co., and not in any manner intending to obligate themselves to purchase any quantity of the articles of the same, which were submitted to them simply as an act of courtesy and good will endorsed the said samples according to the request and suggestion of the said Beck & Pauli Lithographing Co.

9 That the officers of the said Beck & Pauli Lithographing Co. and the said American Publishing Co. are the same, and the said companies while in realty one and the same operate under different names for the purpose of misleading and deceiving the public.

That when the said defendants caused their approval to be made in the manner aforesaid of the samples submitted to them, they had no intention to obligate or bind themselves to order any quantity of the said articles or at any price, and did not in any manner intend thereby to consummate or perfect any agreement with the said American Publishing Company, all of which was well known to said plaintiff.

That after the said sketches were so approved by said defendants, and without any reference to any prior proposal or agreement of any kind, said defendants did order a certain limited quantity of stationery and other articles at prices to be paid by them as agreed upon at the time the said order was made; and it was then and there agreed between plaintiff or the said lithographing company and said defendants that plaintiff would sell and deliver, and defendants would accept and pay for one and one-half million labels at 55 cts. per thousand; 250 views of Salt Lake City, at 80 cts. each; 300 bock cards at 37½ cts. each, one check book at $14.75 and 6,000 advertising cards at $8—. That the last named are the only articles ever ordered or bought, or accepted or received by defendants of said plaintiff.

That after the articles last above mentioned were ordered by said defendants, said defendants were notified by said plaintiff that the same had been shipped to and had arrived at Salt Lake City, and at the same time forwarded a bill therefor to said defendants.

That at the same time said plaintiff had caused large quantities of stationery and other articles referred to in the complaint to be also shipped, consigned to the said defendants, and which articles this defendant in no manner ordered or consented to receive.

That said plaintiff with the fraudulent intention and purpose to induce said defendants to take into their possession said stationery and articles not ordered by them, falsely pretended and represented to said defendants that the said shipment contained only the articles above specified and which said defendants had ordered and agreed to receive, and fraudulently concealed and withheld from said de-

fendants all information or knowledge that the said shipment contained stationery and other articles not ordered by them.

That induced by said false and fraudulent representations made by said plaintiff and such fraudulent concealment of the true nature of said shipment, and at the special instance and urgent request of said plaintiff said defendants caused the whole of the said goods to be taken from the depot and to be deposited upon the premises of said defendant.

That soon after the same had been so deposited upon defendants' premises, and when they first discovered the extent and nature of the said shipment, said defendants immediately notified said plaintiff that they would not accept said goods, and that plaintiff should take them away, and that they would be held by said defendants subject to plaintiff's order, and at its risk and expense.

For further answer and by way of counter-claim, defendants allege, that said plaintiff is indebted to said defendants in the sum of four hundred dollars, paid out and expended by said defendants for the use and benefit of the said plaintiff at its instance and request, said payment having been made on account of freight incurred by said plaintiff on certain large quantities of stationery and other articles shipped from city of Milwaukee, State of Wisconsin, to Salt Lake City, in the Territory of Utah, and no part of said sum has been paid to defendants by said plaintiff.

Wherefore, said defendants pray judgment of this court; 1st, that plaintiff take nothing by its action herein; that said defendants do have and recover of and from the said plaintiff the sum of $400, with interest thereon from the — day of February, 1891, and for costs of this action.

RAWLINS & CRITCHLOW,
Attorneys for Defendants.

(Verification.)

Endorsed: Title of court and cause. Answer. Due service of a copy of the within answer admitted this 26th day of September, 1891. Dey & Street, att'ys for plaintiff. Filed September 26th, 1891. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy.

(Title of Court and Cause.)

Amended Answer.

Now come said defendants and by leave of court first had and obtained, files the following amendment to the answer herein and alleges:

That, to wit, on or about the 30th day of March, 1890, said plaintiff, by its agent A. E. Cotzhausen, represented to the said defendant, A. Fisher, that they had prepared a bird's view of Salt Lake City, and had engaged to deliver a large number of copies of the same to the Real Estate Exchange in Salt Lake City, and to the Union Pacific, the Rio Grande Western Railroad Companies and chamber

of commerce; and that the price which said parties were to
11 pay for said view was $1.25 per copy. That by reason of said engagement, said plaintiff had prepared the necessary sketches for said views, and that they could afford to sell and deliver to said defendants the same at a much less price, to wit, ninety-seven and one-half ($.97½) cents per copy; but that said views were reasonably worth much more than said sum.

Said plaintiff by its said agent further represented to said defendant that certain sketches and articles of stationery particularly set forth in the document alleged in said complaint, were made by them and were of a superior quality, and that the prices as stated in said agreement were below the reasonable market value thereof.

That said defendant was wholly ignorant of the value of any of said articles mentioned in said document, and of said bird's-eye views, with the exception of the bottle labels and bock cards mentioned therein, and that at the time said representations were so made to him by the agent of said plaintiff he had no means of informing him himself as to the reasonable value of said articles; and the value thereof was peculiarly within the knowledge of said plaintiff and its agents.

That in truth and in fact, said plaintiff had not made a contract to furnish said railroad companies or said Real Estate Exchange with the said bird's view of Salt Lake City and the said parties had not undertaken to pay therefor the sum of $1.25 per copy, or any amount per copy exceeding seventy-five cents. And the said bird's views, and the said articles specified in said document set forth in the complaint, were not of the reasonable market value as therein stated, but the prices so fixed were some six times higher than the reasonable value of said articles; and each and every of said representations were false and fraudulent; all of which was well known to said plaintiff and its agent but of which the said defendant was wholly ignorant.

That by reason of said false and fraudulent representations said defendant was induced to sign the proposals aforesaid and not otherwise, and that said document was afterwards altered as hereinbefore alleged.

RAWLINS & CRITCHLOW,
Attorneys for Defendant.

(Verification.)

Endorsed: Title of court and cause. Amended answer. Copy of the within served on this 9th day of December, 1892. Dey & Street, attorneys for plaintiff. Filed this 9th day of December, 1892. Henry G. McMillan, clerk.

12 Title of Court and Cause.

Verdict.

We, the jurors impanelled in the above case, find the issues for the defendant.

WILLIAM H. SELLS.	THOMAS HULL.
F. G. PALMER.	GRANVILL GILLETT.
W. N. COLE.	P. E. BARNUM.
T. H. TAYLOR.	G. W. JEWETT.

O. C. BROWN.

Dated December 10, 1892.

O. C. BROWN, *Foreman.*

Filed Dec. 12, 1892.

HENRY G. McMILLAN, *Clerk.*

13 Title of Court and Cause.

Judgment on Verdict.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of eleven persons was regularly impanelled and sworn to try said action by consent. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider their verdict, and subsequently returned into court, and, being called, answered to their names and say they find a verdict for the defendant as follows, to wit:

"We, the jurors impanelled in the above case, find the issues for the defendant."

WM. H. SELLS.	THOMAS HULL.
E. G. PALMER.	GRANVILL GILLETT.
W. N. COLE.	B. E. BARNUM.
T. H. TAYLOR.	G. W. JEWETT.

O. C. BROWN.

Dated December 10th, 1892.

O. C. BROWN, *Foreman.*

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that the said plaintiff herein have and recover from said defendants nothing, and that the complaint herein be, and the same is hereby, dismissed.

And it is further ordered that the defendants herein have and recover from said plaintiff herein their costs and disbursements incurred in this action, amounting to the sum of $261.20.

Judgment entered December 14th, A. D. 1892.

Clerk's office of the district court of the third judicial district of the Territory of Utah in and for the county of Salt Lake, *ss:*

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action.

Attest my hand and the seal of said court this 14th day of December, 1892.

HENRY G. McMILLAN, *Clerk,*
[SEAL OF COURT.] By GEO. D. LOOMIS, *Dep. Clerk.*

Endorsed: No. 9323. Title of court and cause. Judgment on verdict. Filed December 14th, 1892. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy clerk.

14 Title of Court and Cause.

Bill of Exceptions.

Be it remembered that on this first day of December, 1892, came the parties, by their respective counsel, and the issue herein was brought to trial; thereupon a jury was called to try the same and the following proceedings were had, to wit:

The plaintiff offered in evidence certificate of incorporation, which against objection was received and marked Exhibit "1," made proof of its incorporation, and then offered in evidence a certain written proposal (Exhibit 2), under date of March 28th, 1890, in the words and figures as follows:

The Midland Investment Company.

(Letter-heading.)

SALT LAKE CITY, UTAH, *March* 28, 1890.

A. Fisher Brewing Company, Salt Lake City, Utah.

GENTLEMEN: Will submit sketch for your trade-mark with sketch for your bottle labels, also submitting finished proofs of plates, and will furnish you with one and a half (1½ million) million labels in course of a year after proofs have been made, in black and bronze, with trade-mark inserted, at fifty-five cents (55c.) per M labels, and will duplicate this first year's shipment in each of the following five years at same rate after the expiration of this first year; will also submit six different kinds of sketches for small advertising cards on style of card submitted, printed in colors on front and black on back, furnishing you with 50 M of each kind of cards, after sketches have been submitted, as soon as ready, at $9.75 per M cards. We shall also insert your
15 trade-mark and compliment card on your edition of the panoramic view of Salt Lake City, and will furnish you with 10 M copies of said Salt Lake City view, with trade-mark inserted, after sketch of trade-mark has been submitted to you, as soon as ready, at 97c. per copy (ninety-seven cents) *per copy* of said view;

will attend to the application for registration of your trade-mark for you, and will submit designs for your different stationary headings and for a hanger in course of a year, with your trade-mark embodied on same, furnishing you with 10 M hangers and 10 M of each kinds of the following stationary, as soon as ready, viz., letter-heads 8½ x 11, letter-heads 8½ x 5½, note-heads 5½ x 8½, statements 5½ x 8½, bills 8½ x 7, business cards, and envelopes; will also send you a proof of bock card submitted in spring 1891 (price of hangers and price of bock cards in colors is 37½ — apiece; all prices are made on goods at our office at Milwaukee), with you- name and trade-mark inserted, an- will furnish you 300 bock cards for season of 1891.

Terms, cash on delivery.

Very truly yours,

AMERICAN PUBLISHING CO. OF MILWAUKEE, WIS.,
Per A. E. COTZHAUSEN, *Treas.*

At the foot of said written proposal there appears in writing an acceptance in the words following:

All terms and conditions included in above approved, read, and agreed.

A. FISHER BREWING CO.
A. FISHER."

16 ALFRED E. COTZHAUSEN, the secretary and treasurer of the plaintiff company, testified:

That he signed the proposal on behalf of the plaintiff, and that Mr. Fisher signed the defendant's name thereto. Mr. Fisher retained an exact copy or duplicate; the original was drafted on a blank of the Midland Investment Co., while the different propositions were discussed and talked over. Fisher's duplicate showed no interlineation.

On cross-examination the witness testified, that he arrived at Salt Lake City about the 26th day of March and stayed about a week; that he met Mr. Fisher a number of times, at his brewery and in other places in the city. That they conferred several times; that he had no recollection as to the exact day of the week, but he thought he also saw him on Sunday at the brewery. That at the time the paper was written they discussed the matter for several hours; that he himself wrote the proposition; that after the original was written he made a copy which was left with Mr. Fisher, and that a day or two after, probably one day, he called on Mr. Fisher again at the brewery, in relation to the matter.

That the original paper was written while the several matters were discussed, and that no changes or interlineations were made after the paper was signed.

The duplicate was an exact copy of the original, both of them being signed by the witness, Fisher's signature was not given until the duplicate had been made; the contract was delivered on the same day it was signed; the witness taking one copy and leaving the other with Fisher.

On the redirect examination, the witness identified Fisher's handwriting upon a large number of sketches, designs and proofs of plates, comprising the various classes of work referred to in the written agreement, all of which were then offered in evidence, and were respectively marked Exhibits 3, 4, 5, 6, 7, 8, 9, 10 and 11.

Jos. R. KUSCHBERT testified that in 1890 he acted as the special agent of the plaintiff corporation. That he submitted, about July 24, 1890, to the defendants, at their brewery in Salt Lake City, six colored sketches for the advertising cards—(Exhibit 6), which proved satisfactory, Fisher writing on the back thereof:

"O K. A. Fisher Brewing Co. A. F."

That at the same time he submitted proof of the bottle-beer labels—(Exhibit 7) on which the following endorsement appears:

"Accepted; print in blue and silver. A. Fisher Brewing Co. A. F."

17 Also proofs of the letter-head (Exhibit 4), note-head, statement and business card (Exhibit 7), all of which were approved and endorsed:

"Accepted as per agreement of March 28, 1890. A. Fisher Brewing Co. A. F."

The endorsement to print the labels in "blue and silver" was made, because the original called for black and bronze. Fisher decided to have his label printed in "blue and silver," and it was accordingly sent into the house. There was also a proof of envelope, which was approved like the others, of which Exhibit 12 is a duplicate.

On cross-examination the witness testified that he himself wrote the matter above defendant's signature; that he had a copy of the agreement along at the time, which was sent to him from the house at Milwaukee with the proofs; that it was customary to send such a copy with the proofs to the agent, so that he might know what the work was.

CHAS. J. SMITH, agent for the Milwaukee Litho. & Eng. Co. testified that in 1890 he was in the employ of the plaintiff as special agent. That in April he submitted to Fisher the first designs, the "general idea" to be carried through all the stationery, embodying the trade-mark (Exhibit 8); that Mr. Fisher directed various changes in the colors, the location of the office, etc., which changes were noted at the time by the witness and carried forward as shown by the subsequent proof of plates; that among the designs submitted (referring to the exhibits heretofore offered in evidence) there was a general form for the different styles of stationery (Exhibits 3 and 5); a design for the label (Exhibit 5) and others; all of the sketches for stationery were approved and endorsed:

"O K. Silver, blue and black. A. Fisher Brewing Co. A. F."

The design for the labels is endorsed likewise, but the black color is omitted. There was also submitted a design for an envelope, (see Exhibit 12) which I returned with the other proofs to the house, all O K, same as the others.

On October 29th I submitted finished proofs of the bottle-beer hanger (Exhibit 9) and of the buck-beer card (Exhibit 10). This was at the Walker house, in Salt Lake city; no changes of any kind were directed, both being satisfactory and endorsed.

"Approved October 29, 1890, as per agreement of March 28, 1890. A. F."

At the same time I submitted a proof in black, to go on the back of the small advertising cards (Exhibit 6) which Fisher also accepted by endorsing his name thereupon.

18 The latter part of December, 1890, I submitted the panoramic view of Salt Lake City (Exhibit 11). I was requested to raise the compliment card up nearer to the picture; it was thought some people would cut off this compliment card and hang the picture on the wall, so I put down the words "Lift up compliment card" like this. It was put on at Fisher's and Williams' suggestion. Fisher at the same time requested several other little changes; he wanted his brewery to come out a little stronger, and one or two little bridges; things like that—all of which were noted. The panoramic view shows the following approval:

"December 26, 1890.—To American Publishing Co., Milwaukee: Proof approved, raise compliment card up and ship by freight as soon as ready by January, the goods referred to in our agreement of March 28, 1890, provided Real Estate Exchange accept map.

"A. FISHER BREWING CO.
A. FISHER."

The provision as to Real Estate Exchange came to be inserted in this way: There had been some talk that the map was not entirely satisfactory; it came to Mr. Fisher's ears, he wanted that provision made, and I knew that the Real Estate Exchange would adopt this; so I put in this provision that it was optional, as I knew that it would be accepted anyway. This was put in at Fisher's request; he would not sign, until I had inserted it.

After Fisher had approved the sketches in the Walker house in October, he took me to a notary, a few doors above the Walker house, in whose presence he signed the application papers for the registration of the trade-mark, which our house had caused to be prepared. Later on we sent it to Washington with $25.00 registration fee.

On cross-examination the witness testified, that when he submitted the first sketches in April, no one was present but Fisher and himself; so again in October. The third time, in December, his book-keeper, Williams, was present. It is not true that, when the first sketches were submitted, Fisher told me that he only needed so many of these sketches, that he would take so many of them, samples of which were submitted at the time. When the bird's-eye view was submitted, Fisher did not object to approving it; he made the remark that there was some dissatisfaction about the view; he wanted to know what it was; he asked me for information; he seemed to be fully satisfied after it was explained; but he wanted me to put in that line on the bottom that, if they were refused by

the Real Estate Exchange, he would not have to take them, and so I did. My commission depends upon the event of this case. Plaintiff is suing for about $18,000. If it recovers $20,000, my commission will be $2,000.

19 I am to a certain extent interested in this case; I was working on commission; I got 10 per cent. That is what I work for.

None of the words and writings shown over the signature of defendants were written subsequent to Fisher's signature, but every one of them was written before he signed. I wrote some of the approvals in blue pencil, some with a lead pencil, and some with ink, I did not think we would have to come into court.

On his redirect examination, the witness further stated: I also obtained the paper from the Real Estate Exchange on the panoramic views (Exhibit 13). (Set forth at length in testimony of John Montgomery, Jr. Fol. 58.)

A. E. COTZHAUSEN, being recalled, testified that he had been engaged in the lithographing business, and had formed a knowledge of it in all its branches, for some eight years past.

Q. I call your attention now to the agreement of March 28, 1890, and so that the court and jury may properly understand the meaning of some technical terms used in the paper, and correctly apply its language to the subject-matter and surrounding circumstances—will you please state in a summary manner the art and process of lithographing, involved in the execution of work of this character—which question was objected to, and the objection sustained, the court holding that no evidence should be received, except to explain the technical terms, if any, used in the agreement; to which ruling the plaintiff then and there duly excepted.

We also received an order for a check book, which was in writing, (Exhibit 13 B) as follows:

A. Fisher Brewing Company.

(Letter-heading.)

SALT LAKE CITY, UTAH, *July* 25, 1890.

The Beck and Pauli Litho. Co., Milwaukee.

GENTLEMEN: Please enter our order for 1,000 checks in two books, printed in black, with trade-mark in colors. Will leave design to you, so that you can hurry and get them out as soon as possible.

Commence numbering with 1,551, bind three on page (check binding) and perforate. You need not send us a proof or design so as to save time.

Send books by express as soon as possible.

Yours, A. FISHER BREWING CO.
A. F.

When the proofs were returned to our house in Milwaukee, the work was all placed with the Beck and Pauli Lithographing Com-

pany to be properly lithographed, engraved and shipped. The work was done under my charge. I am also the secretary and treasurer of the lithographing company. The work was all done in accordance with the corrected designs and proofs submitted; it was shipped to the Fisher Brewing Company, one small shipment in August, the next in December, and the last on January 30th and 31st. The various bills now offered in evidence show all that was shipped, and cover all the articles specified in the agreement of March 28th, except the labels for future delivery.

MILWAUKEE, *December* 15, 1890.

A. Fisher Brewing Co., Salt Lake City, Utah, to American Publishing Co., Dr.

Duplicate bill.
Part of order. Subject to sight draft on January 29, '91.

To designing, engraving and printing—

50 M labels, shipped 8–30–'90	
50 M " " 12–15–'90 at 55c. a M	$55 00
1½ M letter-heads 8½ x 11, ½ M shipped 8–30–'90.	
1 M letter-heads 8½ x 5.	
1½ M note-heads 5¾ x 8½, " " "	
1½ M statements " " "	
1 M checks.	
1½ M bill-heads 8½ x 7 " " "	
1.6 M business cards, $\frac{6}{10}$ M " "	
8.6 M in colors, at $14.75	126 85
	$181 85

MILWAUKEE, *January* 30, 1891.

A. Fisher Brewing Co., Salt Lake City, U., to American Publishing Co., Dr.

Duplicate bill.
Part of order.

To designing, engraving and printing—

300 buck cards at 37½ cts. apiece	$112 50
250 views of Salt Lake City at 97c. apiece	242 50
1.4 million labels at 55 cts. a M	770 00
9 M large letter-heads.	
8½ M small letter-heads.	
9½ M note-heads, 8½ x 5½.	
8½ M statements.	
8½ M bills 8½ x 7.	
8.4 M business cards.	
10 M envelopes.	
62.4 M at $14.75 a M	920 40
	$2,045 40

21 MILWAUKEE, *January* 31, 1891.

A. Fisher Brewing Co., Salt Lake City, U., to American Publishing Co., Dr.

Duplicate bill.
Part of order.

To designing, engraving, and printing—

300 M advertising cards, at $9.75 a M.....	$2,925 00
9,750 views of Salt Lake City, at 97c. apiece	9,457 50
10 M hangers, at 37½c. apiece	3,750 00
	$16,132 50

There was included in the shipment of August 30th 1,000 checks in book form; this shipment covered 50 M labels, 1 M checks and some stationery. The order for these checks was received by the Beck & Pauli Lithographing Co. They knew we were doing business with the Fisher Brewing Co. It was a small matter and they transferred it to us and we filled the order.

The following letters cover all the correspondence we ever had with the defendants in relation to the subject-matter of this litigation, aside from the order for the check book, viz:

A. Fisher Brewing Co.

Manufacturers and bottlers of (Trade-mark.) Office at brewery.

Export lager beer.

Telephone 265. Post-office box 556.

(Written on one of the letter-heads shipped Aug. 30, '90.)

SALT LAKE CITY, UTAH, *Sept.* 13, 1890.

The Beck & Pauli Litho. Co., Milwaukee, Wis.

GENTLEMEN: We received a box from you today containing 5 bundles of labels, 500 mem., 500 bill-heads, 500 statements, 500 note-heads, 500 letter-heads and 3 packages of cards and check book. The work so far is quite satisfactory, but the adv't'g cards, which we were waiting for, did not come. Please forward as soon as possible and make no more mem. as we do not use them.

Yours resp., A. FISHER BREWING CO.
W.

SEPTEMBER 17, 1890.

Fisher Brewing Co., Salt Lake City, Utah.

GENTLEMEN: Your favor was duly received and referred to the undersigned; in reply we wish to say that your stationery was all finished some time ago, and we sent small lot to you to help out as soon as same could be got ready, giving balance of the work ample time to dry well.

22 We think your trade-mark a ten-strike in every respect, and are glad that you agreed with us on same. We are push-

ing your other work through with all possible speed consistent with a good execution, but do not wish to rush same too badly, so as to endanger the quality of the work, as we wish to give you the very best we can do, knowing that you appreciate our efforts; will push balance of your work through as requested as soon as same can be done in good style, and hope to be favored with a continuance of your kind patronage for the future.

Very truly yours,

AMERICAN PUBLISHING COMPANY.
A. E. COTZHAUSEN, *Treas.*

A. Fisher Brewing Company.

(Letter-heading.)

SALT LAKE CITY, UTAH, *Jan.* 24, 1891.

American Publishing Co., Milwaukee, Wis.

GENTLEMEN: We have today received an invoice from you purporting to be a mem. of a part of our order for stationery, and also advising us thereon that you would draw on us at sight January 29, for $181.35. It would be just as well for you to with-old your draft, as, if presented we shall refuse to pay it.

Whenever you see fit to complete our order, ship and invoice properly; upon arrival of goods and same found to be as ordered, we shall be pleased to remit you at once.

So far, owing to your peculiar and mysterious manner of doing business, as indicated by your conduct towards us, we have refrained from using any of the order now here, (other than the check book).

Yours resp., A. FISHER BREWING CO.
W.

JANUARY 28, 1891.

A. Fisher Brewing Co., Salt Lake City, Utah.

GENTLEMEN: Replying to your favor of the 24th inst. we beg to say that we shall not pass draft as requested by you, but trust you will find shipment of goods correct as per invoice sent you recently.

Our representative, Mr. Smith, will probably see you within a few weeks when through your territory again, and we have pushed through your work as fast as same could be done consistent with a good execution, and shall ship same shortly as requested, and hope you will find same a winner, as same is certainly strikingly appropriate in every particular.

23 Hoping that same will be satisfactory, and that work will prove a ten-strike with your trade, we beg to solicit a continuance of your kind patronage, which is appreciated most highly by us, and hope to be favored by any other new work that you may need in our line.

Very truly yours,

AMERICAN PUBLISHING COMPANY.

A. Fisher Brewing Company.

(Letter-heading.)

SALT LAKE CITY, UTAH, *Feb.* 24, 1891.

American Pub. Co., Milwaukee, Wis.

GENTLEMEN: Kindly send us by return mail a copy of the paper or document signed by our Mr. Fisher relating to labels, stationery, etc., shipped us.

Yours resp., A. FISHER BREWING CO.
W.

MARCH 2, 1891.

A. Fisher Brewing Co., Salt Lake City, Utah.

GENTLEMEN: Your favor of the 24th ult. received, and in reply we wish to say that we shall refer your communication to our sec'y upon his return, as he has charge of all such documents as you refer to in your communication.

Very truly yours, AMERICAN PUBLISHING CO.
Z.

A. Fisher Brewing Company.

(Letter-heading.)

SALT LAKE CITY, UTAH, *Feb.* 26, 1891.

American Publishing Co., Milwaukee, Wis.

GENTLEMEN: On Mar. 28th last we placed an order with your Mr. Cotshausen for one and one-half million labels at 55c. per M. Three hundred buck cards at 37½ each and some two months or so ago we gave your Mr. Smith an order for 250 views of Salt Lake City at 80c. each. Mr. Smith also at this time advised us that there was a full car-load of paper coming through and entire shipment would be consigned as a car to him, in order that your customers would be saved the very heavy charges consequent upon shipments of less than car-load lots. We requested that shipment be so made; it was not done, and through your negligence we were compelled to pay a charge of $3.20 per 100 pounds; when the rate should have been $1.46 per 100 pounds if shipped as directed; the difference we expect you to pay and will advise you of the amount when we receive another expense bill from the R. R. Co.

24 With this shipment we have received boxes containing (as per invoice handed us by Mr. Smith) some 70,000 stationery, consisting of letter-heads, note-heads, bills, statements, envelopes and business cards. We have not ordered any such stationery from you, and hold all of same subject to your order and subject to freight charges paid by us, same having been taken from depot in order to save you storage and demurrage charges. How you came to ship us this stuff we do not know, cannot understand; as we gave you no order for same. When your invoice of Dec. 15 was received, showing a shipment of a small lot of stationery, we did not know then what it meant, and repeatedly requested your Mr.

Smith to have a copy of your proposition mailed us (the copy left with us having been taken from us by one of your men.) This was never done. In Sept. we wrote B. & P. Lith'g Co., and in referring to their work praised it; thinking at the time that they had sent us a small lot as a sample, and being a small matter, thought we could use same eventually, though not needing it then nor now. But when in January that invoice came, and we saw that you had charged us $14.75 per M for stuff not ordered we were surprised and wrote you regarding your contemplated draft. We again reiterate that we gave you no order for such stationery, and will not accept it; neither will we accept anything more from you now or in future. The labels, buck cards and check book now here we accept, also the 250 views at 80c. each, the balance of the shipment is held subject to your order and at your risk.

Yours resp., A. FISHER BREWING CO.
W.

After receipt of Fisher's letter of February 26th, we stopped work on the labels, because we make it a rule to stop work whenever customers countermand orders.

The customary and ruling price of stationery like that furnished to defendants, at or about that time, in lots of 10 M, more or less, was $14 75 per M; it was stationery in colors—silver, brown, blue, and black—4 prints. This applies to all the stationery referred to in the agreement of March 28, 1890.

When the order for the balance of the labels was cancelled, the remainder of the work still to be done—the cost of the paper and printing—would have amounted to $1,665.00, which would be the cost of finishing the balance of the labels, the designs, engravings, plates, and transfers having been already made. This $1,665.00 represents the actual cost of saving for the necessary further printing, paper, boxing, and shipping. This amount is made up as follows:

25	Cost of paper	698 10
	The new set of transfers	8 00
	Allowance for spoiling paper	7 90
	Printing 89,500 sh/ets in silver, bronze, and blue	865 00
	Cutting and packing	150 00
		$1,665 00

which amount we deduct from the original contract price. The difference would constitute the cost of the work already done up to the time of countermanding the order, the general office and running expenses, traveling, commissions, and profits. The work and plates thus far done would be of no value whatever to us or any one else, unless we could print from them. This is the case with all lithographic work.

The letter of September 13th refers to memorandum letter-heads—small-sized memorandum heads—when we received this letter to which it was stated, " Please make no more memo's, as we do not use

them," and we answere- them so the next day. We have received no money from the defendants. The amount of work delivered is $18,384.75, which includes a check book for $14.75. The whole amount of our claim is $20,844.75.

MILWAUKEE, WIS., *April*, 1891.

A. Fisher Brewing Co., Salt Lake City, Utah, to American Publishing Company, Dr.

1890.			
Dec.	15.	To mdse.	$181 85
1891.			
Jan'y	20.	To cash to Washington...	25 00
Jan'y	30.	To mdse.....	2,045 40
Jan'y	31.	To mdse....	16,132 50
March	31.	To mdse.....	2,460 00
			$20,844 75

All the work was shipped from Milwaukee by rail, duly consigned to the defendants at Salt Lake.

26 Q. I would like you to state all you remember about the shipment of those goods, whether it took one day or two days to get them to the railroad.

A. To my memory it took about one hour, but I didn't supervise the driver nor was I with him.

Q. I didn't ask you that, but you know when they began taking the goods away and when they ceased to take them away; you said you were there and supervised it.

A. I didn't spend my time in the shipping-room.

Q. You said you were there and supervised this shipping. Now, will you be kind enough to tell me how long it took to get all these goods away from the factory?

A. I have answered that question three times.

Q. Answer it again.

A. I said about half an hour each time.

Q. How many times were they?

—. Twice, to my recollection. There may have been two.

Q. Was it all?

A. There were two different times.

Q. Were they all substantially sent to the railroad in one transaction of two days, delivery continued until it was completed, that occupied a part of two days—that was true?

A. I didn't exactly understand.

Q. They were put in the same car?

A. I don't know anything about the car.

Q. Weren't you here in Salt Lake, and didn't you see the goods in one car?

A. I didn't see the goods at any time in any car here.

Q. You didn't see the goods at all?

A. I saw some of the goods *he* here.

Q. Where?
A. At the depot.
Q. What place in the depot?
A. I think it was in the depot.
Q. In the car or at the car?
A. I think it was at the car. I don't recollect the details of that.
Q. You supervised that shipment at Milwaukee, didn't you?
A. Yes, sir.
27 Q. You were shipping other cars to different other customers here in Salt Lake, weren't you, at the same time?
A. We were; yes, sir.
Q. And you were putting them all in the same car, weren't you?
A. I have repeatedly told you I didn't know anything about the car.
Q. Didn't you arrange to ship them all in the same car?
A. I don't know anything about the car.
Q. You say you attended to it?
A. At the office, please. Our office is not at the freight——
Q. (Interrupting.) Didn't you arrange to have them all put in on car?
—. ——.
Q. How many boxes?
A. I don't remember that.
Q. How were the boxes labeled, if at all?
A. I think they were addressed to the Fisher Brewing Company.
Q. Do you know?
A. They were addressed to the Fisher Brewing Co.
Q. Do you know?
A. I know I saw them at Milwaukee marked that way.
Q. You saw them at Milwaukee?
A. Yes, sir.
Q. That is all you know about it so far as your personal knowledge goes?
A. Possibly.
Q. You made out a bill for a part of these goods amounting altogether to $204 for 300 bock cards, 37½ cents apiece; 250 views Salt Lake City at 97 cents apiece, and some other articles. You made out a separate bill of that, didn't you?
A. Yes, sir.
Q. Those goods all left Milwaukee at the same time with the other goods?
A. I have no knowledge of the day they left Milwaukee. I repeatedly answered you that.
Q. Well, they left the factory about the same time?
A. If you call two days apart the same time, about the same time; yes.
Q. That was part of the same shipment?
A. Apparently not.
Q. Now, don't you know that it was?
A. There was one shipment made.

28 Q. Do you mean to say it was two shipments or one shipment?

A. It was exactly what the bills of lading call for.

Q. I didn't ask you that. I want to know whether you understood that to be two shipments or one shipment.

A. If you will let me explain——

Q. Just answer that question. I asked you whether you understood these goods mentioned in that bill, to which I call your attention, were a part of the same other shipment of the other goods or not.

A. They were separate shipments from our factory.

Q. Was it a separate shipment?

A. It was a delivery——

Q. (Interrupting.) To be put in a different car; to leave and arrive at Salt Lake at different times?

—. I don't think I can answer that question; I don't know nothing about the car; can't say in which car it left.

Q. This bill that has been introduced in evidence for the 250 views of Salt Lake and the 300 bock cards, that bill was made out and sent to the Fisher Brewing Co. along with the shipment, wasn't it?

A. I think not.

Q. This bill here of which this is a copy?

A. No, sir; I think that was sent to Smith also, although I have no definite recollection of that.

Q. Were both these bills made out after the shipment here?

A. Naturally.

Q. And as men came and took the goods away with the teams from the factory to the railroad company during the two days you said a little while ago he made a list of the articles that were shipped, and subsequently you supervised the making up of the bill which corresponded with that list which he made out, and in making up these bills you made two bills, *and* for $204 and another for $16,132; that is true, is it?

29 A. I supervised the making out of these bills, checked them over; the details I didn't look into.

Q. After the shipment was made you say both bills were made out?

A. Naturally.

Q. Naturally so the bills were made out?

A. Yes, sir.

Q. Now, will you be kind enough to tell the jury why you took pains to make out two bills instead of having it all put in one bill?

A. The goods that were shipped on January 30th were sent ahead on the instructions of our agent.

Q. Were they sent ahead?

A. The instructions from the agent they wanted some of the goods.

Q. Were they sent ahead?

A. From our factory; yes, sir.

Q. I thought you said awhile ago you didn't know nothing about that?

A. I know they left our factory.

Q. You don't know whether you said you didn't know whether it was one shipment or two shipments; you said that, didn't you? You said you didn't know whether it was all shipped one day or two days or whether it was in one car or two cars; you don't know about that.

A. I said——

Q. (Interrupting.) You didn't see it go off and you didn't know you said that, did you not?

A. I beg to repeat. I said that——

Q. (Interrupting.) Please answer my question whether you said so or not.

A. To my recollection, not, sir; no, sir.

Q. If you did say so it was a falsehood, was it?

A. There was no falsehood about it; I didn't say so.

Q. You positively deny it?

A. I do.

Q. You are as certain of that as anything you have testified to?

A. Yes, sir; I am, absolutely.

30 Q. Now, then, you were proceeding to say this bill was sent ahead—was it sent ahead?

A. I said, and repeat, that the goods on Jan. 30th left our house the day before the others; the other goods left our house the next day. I say part of the goods were to be shipped as soon as possible, both in letters and in reports from our agents. We got part of that stock over to the freight office as soon as we could; the others we wanted to get rid of, it was shipped as soon as possible.

Q. And the all left Milwaukee on the same car and on precisely the same day for all you may know about the shipment from the freight office?

A. I don't know anything about that. I am not in the freight office.

Q. You don't know anything about that?

A. No, sir.

Q. Didn't you know that it was agreed with Mr. Williams those goods were all to be sent in one car load, and that car would be consigned to somebody so the freight would be less than the ordinary charge?

A. I never met Mr. Williams.

Q. Didn't you understand that was the arrangement?

A. I didn't understand nothing of the kind.

Q. Didn't you know this car which contained the things to Fisher and to Wagener was consigned to Wagener or was it consigned to Smith?

A. We consigned no car-load at all, to my knowledge, of any description.

Q. They were all put in the same car?

A. Well, you know more about that than I do; I know nothing of the car.

Q. Smith never told you of it?
A. Whether they left Milwaukee?
Q. Did Smith ever tell you they came here in the same car?
A. I think I heard they came here in the same car.
Q. Smith told you?
A. I don't know who told me, but I heard that.
31 Q. Didn't he tell you that he got an order from Wagener in order that he might get possession of the car?
A. Of the car?
Q. Yes.
A. No, sir.
Q. He did get possession of the car, didn't he?
A. We had no car-load here.
Q. Didn't Smith tell you upon your arrival here in Salt Lake that all these goods came in the same car, and that he got an order turned over to him?
A. I have no knowledge of any car being sent to Mr. Smith or being turned over to him.
Q. Didn't he tell you the goods came in one car—Wagener's goods and Fisher's goods?
A. I think I recollect that he said—something was said of the goods coming in the same car—being transferred to this railroad here at some place on the route here—arrived here in the same car, but that is the extent of it.
Q. They all came in the same car?
A. That was the extent of it.
Q. Now, you state one reason for making out this bill was that 250 views had been ordered by Mr. Fisher.
A. I didn't say that, if I remember correctly.
Q. Didn't you say he specially ordered that number of goods and the 300 bock cards and wanted them in a hurry?
A. I didn't.
Q. And because they wanted that amount of goods in a hurry you caused this shipment to be made earlier than the others?
A. I said we had letters and reports from some of the agents that they wanted some of the goods as soon as possible they could get them. We answered the letters accordingly.
Q. What letters did you have?
A. We had several letters—wanted the small advertising cards—and the reports from agents——
Q. (Interrupting.) Have you got th-se letters?
A. You have got them here.
Q. Letters introduced in evidence?
A. Yes, sir.
32 Q. Are those what you mean?
A. It was a letter about small advertising cards being shipped as soon as possible—they wanted them.
Q. You were informed when those goods arrived, were you not?
A. I don't know that I was.
Q. You gave Mr. Smith instructions how to proceed after he got here when the goods arrived, did you not?

Mr. DEY: I object to that, if the court please, as improper cross-examination, not bearing upon anything pertaining to any matter we proved at all.

The COURT: You object to the statement whether he instructed Mr. Smith?

Mr. DEY: Yes, sir; as not proper cross-examination.

The COURT: He may answer the question.

Q. If you did give him any instructions, say so; if you didn't, say not.

A. Why, Mr. Smith might have talked about it here, because I had some shipments of goods. I don't remember any distinct instructions of any kind myself. He knew that for himself. He had some goods for himself here.

Q. He had some?

A. Some shipped to him.

Q. The entire car was shipped to him?

A. No, sir.

Q. Didn't you instruct him to deliver this bill for the $2,200 for the 250 views?

A. I didn't give him special instructions of any kind.

Q. Do you deny you gave him instructions?

A. I did not.

Q. You had made a bill out separately?

A. Yes, sir.

Q. You sent it to Smith?

A. I personally did not.

Q. You caused it to be?

A. Yes, sir.

33 Q. Didn't you expect him to present the bill when the carload of stuff arrived?

A. I gave no special instructions of any kind.

Q. Do you deny you did so instruct him?

A. I gave no special instructions.

Q. Now, the reason you say you hurried these things forward from the factory to the railroad when the other things were taken from the factory on the 31st, they had sent a request to have certain cards—certain articles—hurried forward, and among these things were advertising cards?

A. I think it was advertising cards amongst them.

Q. They were the things that were so pressing—wanted to get out in a hurry—therefore they were sent on the 30th; the other things were sent on the 31st?

A. They were all sent as soon as they were gotten out.

Q. Is that correct?

A. They were all sent as soon as gotten out.

Q. Did you hurry these things off on the 30th in order that this special request for advertising cards should reach here sooner than the others?

A. We had no control of the reaching; we sent them as soon as we could get them away.

Q. Will you please answer my question? Did you send them on the 30th because of the special request that they wanted them in a hurry?

A. Yes, sir.

Q. I find that the advertising cards are included in the bill which was shipped on the 31st.

A. It appears that they were not ready before that. I have not the details of that in my mind.

Q. So that the letters which refers to the advertising cards referred to that as a reason why you made the shipment; that shipment was delayed, wasn't it?

A. I don't know the details of the shipment exactly.

34 Q. You supposed it?

A. My recollection doesn't go back three years.

Q. You didn't charge your memory with it all?

A. No, sir.

Q. You haven't a very good memory?

—. I have a good memory; yes, sir.

Q. You can't remember what you have said five minutes after you have said it?

A. I can remember an hour.

Q. A moment ago you didn't remember two minutes, did you? That is not the reason, then; there is the bill of the advertising cards in the bill for the goods shipped on Jan. 31st?

A. Yes.

Q. There is no bill for advertising cards in the bill of the 30th; the advertising cards are in the bill of the 31st?

A. There is letter about advertising cards.

Q. You wish to rely or stand by your testimony given here that because they had made a special request for advertising cards you sent the small lot first?

A. I didn't particularly refer to the advertising cards alone, but their letters of January stating they wouldn't pay for any goods unless the balance was shipped promptly, to we sent the goods as soon as we could get our money.

Q. You didn't care about when they left Milwaukee, you simply wanted to get them away from your factory?

A. We couldn't control the freight office there nor here.

Q. Did you call on Mr. Williams about the 20th or 24th of December—I mean February?

A. I called on Mr. Fisher. I called on the Fisher Brewing Co. about that time and met Mr. Williams there for the first time.

Q. Had you just then arrived in Salt Lake City?

A. I think it was shortly after I arrived; I don't remember the exact detail shortly after I arrived here.

Q. The goods were still at the depot at that time?

A. When I got down to the office?

35 Q. Yes.

A. No, sir; they were at Fisher's brewery.

Q. I thought you said when you arrived here you saw the goods at the railway station?

A. Yes; but this was shortly after I arrived. I don't remember the details and hours.

Q. When you arrived here the goods were at the railroad station?

A. When I arrived here there were some goods at the railroad office. I don't know exactly what they did contain. I didn't count them over.

Q. Were they Fisher's goods or not?

A. I think there was some of Fisher's goods also.

Q. What makes you think so?

—. My recollection is there was some there.

Q. Did you see the boxes?

A. Yes, sir.

Q. Did you notice how the boxes were labelled?

A. My recollection is that they were marked in ink "Fisher Brewing Co."

Q. How many days after you had arrived here was that?

A. I think it was about the same day, if I am not mistaken.

Q. Same day?

A. Yes, sir; I think it was the same day.

Q. You had this bill for $16,000 in your pocket, didn't you?

A. I think I had the duplicates that they sent to me here. I didn't have it in my pocket.

Q. Up to that time this $16,000 hadn't been presented to the Fisher Brewing Co.?

A. I think when I was out there I presented it or offered it, to my recollection.

Q. When?

A. About the 24th or 26th; I don't remember exactly.

Q. When did you offer it?

A. When I was out there once in February—and of February.

Q. At the end of February?

A. About the 26th or 24th. I don't remember the date exactly. It refers to it in the letter.

Q. It was after you saw the goods down at the brewery, wasn't it?

36 A. Yes, sir; I didn't see the goods at the brewery exactly. I saw some of the goods in the office.

Q. You had been down to the brewery?

A. I was down to the brewery then.

Q. You had seen the shipment of goods stored away in the brewery, had you?

A. I don't remember of seeing the shipment in the brewery. I saw some in the office, tacked on the wall.

Q. It was after that you think you presented this bill for $16,000?

A. I think it was some time, as I was only there once that time.

Q. Where did you present that bill?

A. At the office.

Q. Uptown office?

A. No, sir; in the brewery; small office.

Q. After you saw the goods you presented this bill; it was on the

same occasion you went down there and saw the goods there you presented this bill?

A. I saw no goods there excepting in the office.

Q. You saw the goods stored away in the same building; is that true or not?

A. I say I don't recollect having seen the goods in the same building. I have seen some in the office tacked up on the wall. That is what I said.

Q. Was it you or Smith that tacked them up on the wall?

A. It was neither of us, to my knowledge.

Q. You and Smith repeatedly presented the other bill right away, did you not?

A. I presented the $2,000 bill.

Q. Presented the $2,000 bill?

A. Yes, sir; to get some money.

Q. That bill also went by mail?

A. I don't recollect that; I think not; I think that bill went to Smith.

Q. Were those boxes numbered that contained these goods?

A. I don't remember that.

Q. That you shipped from Milwaukee?

A. I don't recollect that.

Q. Didn't you cause them to be numbered?

A. I don't recollect.

37 Q. Weren't they numbered from 1 to 18?

A. A shipping clerk may have numbered them; I don't know anything about that.

Q. You didn't cause Smith out here to look after them and be informed of the contents of each of these packages by number?

A. I gave no special instructions to Mr. Smith.

Q. You were informed, were you not, by Smith that Fisher, at the time he approved or signed the bird's-eye view, had said that he would sign it upon the condition that he took only 250 at 80 cts. each, and that that was the understanding; were you so informed?

A. I wasn't so informed.

Q. And because you understood that Fisher had agreed to take 250 bird's-eye views you caused those to be put in a box and put upon the first bill; is that true or false?

A. We were not informed——

Q. (Interrupting.) Answer that question. Is that statement true?

A. I wasn't so informed.

Q. You were informed, were you not, by Mr. Smith that 300 bock cards — wanted by Fisher, and that he, at the time of the approval of the sketches—it was agreed that he would take 300 bock cards?

A. I was not.

Q. And for that reason the bock cards were put on the first bill of $2,000?

A. I was not so informed of such a thing. I was not informed of any change.

Q. You were informed, were you not, by Mr. Smith that Mr. Williams had said that prices were made satisfac-ory at the time of

the approval of the sketches and stationary; if they were not so notified as to the prices they would take a thousand of each kind of stationary; that would be letter-heads, note-heads, and statements?

A. I was not.

38 Q. And for that reason you caused that number of articles and kind of articles to be put on the first bill?

A. I was not informed of Mr. Williams' pleasure in that matter. I didn't know him.

Q. You hadn't been advised of that?

A. Mr. Williams was a stranger to me long after that.

Q. You hadn't been informed of that by Mr. Smith?

A. No, sir.

Q. You are also connected with the Beck & Pauly Lith. Co.?

A. Yes, sir.

Q. In what capacity?

A. Secretary and treasurer.

Q. How long have you been acting in that capacity for both companies?

A. I think I am some four years in the publishing Co. and I was secretary of the other company for about 6 or 7 years.

Q. By reason of that experience you claim to be an expert in the lithographic business and to quote prices of stationary of the kinds described in this contract?

A. Fairly so; yes.

Q. An expert in that business?

A. Yes, sir.

Q. Does it require an expert to know the value of those things?

A. It does.

Q. Ordinary men are not familiar with the value, as a rule?

A. Not unless they have been purchasers of *the* or consumers of that class of work.

Q. You said that the price of labels was 55 cts. a thousand?

A. Yes, sir.

Q. And 5 million—1½ million each year would be 7½ million. Did you figure up what that would amount to?

A. $4,100, I think.

Q. You said that the cost of printing would amount to $1,665. That is the cost of printing?

A. Of finishing.

Q. Of finishing. That is printing, isn't it?

A. Printing and cutting.

Q. $1,665?

A. Yes, sir.

39 Q. That would be the prices over and above the cost; that would represent a profit of about 150%, wouldn't it?

A. It would not be profit.

Q. I am saying if there was no other expense connected with it?

A. No, sir.

Q. 148 per cent., taking into consideration these figures. That is simply on the labels, isn't it?

A. That is——

Q. (Interrupting.) You said to Mr. Dey—told what it would cost to get up a sketch and prepare the stone, make the necessary preparations for printing. Can't you do that?

A. I can figure what it cost to copy and reproduce the label, but I can't figure what it cost us to originate the design. The order came back after submitting the sketches; came back to the shop and engraved them, and originated the whole label. I can't figure that this minute.

Q. Well, a pencil sketch is made first, isn't it?

A. Yes, sir.

Q. Can't you tell what it would cost to employ a competent man to make that sketch?

A. The pencil sketch itself of the label, that I can't judge.

Q. Well, would it be a thousand dollars?

A. No.

Q. About how many?

A. Two or three dollars.

Q. What is the next step in the process after the sketch is made?

A. There is a design made for the trade-mark.

Q. That is the trade-mark there?

A. Yes.

Q. That is inserted in all the other stationary?

A. Yes; it was made through, made large.

Q. This is a common design, not made especially for this label?

A. It was made for the label first.

Q. Was it?

A. I think so.

Q. That was because Fisher first only ordered labels and nothing else?

A. I think they wanted labels first; yes, sir.

Q. Well, to make a sketch or trade-mark cost you two or three dollars?

A. No; label proper, I said.

Q. What would it cost you to make the pencil sketch of the trade-mark?

A. I couldn't figure exactly that.

Q. Assuming you got a competent man to do that in pencil, what would it cost?

A. I couldn't give you the exact figure.

Q. How much would it cost to employ a man to make a pencil sketch—a competent artist?

A. That depends entirely upon how many sketches he makes.

Q. Assuming he has the ordinary difficulty in that work, nothing extraordinary.

A. It depends on——

Q. Well, it depends on other things; there is certain ordinary work which you would have reason to anticipate in the employment of an artist to do that work.

A. Trade-marks are not ordinary work.

Q. You have extra employed men to do that?

A. Yes, sir.

Q. Do you know what it would ordinarily cost to hire an artist to do that job?

A. I could tell you what it cost after he knows how to make it out.

Q. Tell us that, then.

A. After he gets the idea and works it up, about $10.

Q. $10 for the trade-mark?

A. Yes, sir.

Q. Then the sketch, you say, would be $12.50 after the man knows how, the mechanical work?

A. That is the mechanical work.

Q. The next step?

A. Engraving.

Q. Then what?

A. That has to be colored; then the engraving is made.

41 Q. What does the engraving cost?

A. Probably $15 or $20.

Q. That is the engraving on stone?

A. Yes; of the different plates.

Q. How many plates would there be?

A. There are two plates in this, three prints each.

Q. Two plates—that would be how much?

A. $15.

Q. What is the next step after the plates are made?

A. After the plattes are made the transfers are made.

Q. Transfers to what?

A. Transfers from the original stone on large stones; reproduction, in other words.

Q. What does that cost?

A. Transfer may cost from four to nine dollars.

Q. What is the next step?

A. After that they are printed.

Q. They are ready for printing then?

A. Yes, sir.

Q. After that work is done you can print five, 10, or 20,000 or any other number—millions—can't you?

A. Yes; got to change your transfers over.

Q. From $21 to $33 is the entire cost, as your figures make it, of getting ready making the preparations to print that label?

A. That is mechanical.

Q. That includes the sketching of the trade-mark which is used on all the other stationary?

A. It doesn't include that.

Q. Costs of labels when ordered first?

—. No, sir.

Q. You made this sketch specially, as I understand you, for the labels?

A. No, sir; that trade-mark was not made for the sketch—for the label alone. It was made for other work also, but had to be originated for that first, on that size.

Q. It is the same size in all the stationary?

A. Different plates.

Q. Same size, isn't it? Is that trade-mark identically the same in each and every——

A. (Interrupting.) It is a reproduction of the same thing.

42 Q. The sketch covers the whole thing?

A. The cost of the original designing of the trade-mark is not included in those, as I represented before. It was an item by itself.

Q. $1,665 would be the cost of printing 7½ million labels after the preparation. In the way of preparation of the sketches that amounts to $33 on the outside—$21 to $33. That would make $1,700. That would be the entire cost connected with the preparation and for the printing of 7½ million labels?

A. That is the cost for the mechanical work. That does not include the originating and working up of trade-marks and changing it, nor does it include the running expenses, office expenses, soliciting expenses; that is purely the expense of the mechanical work of production.

Q. I didn't ask you about the soliciting.

A. I thought I would enlighten you on that.

Q. The office expenses—I suppose you would have to pay your office expenses if you hadn't this order from Fisher at all?

A. Well, it is divided up.

Q. Would you have had to pay it if you hadn't procured this order from Fisher?

A. I suppose so.

Q. You would have had to employ your soliciting agents if you hadn't got this order from Fisher?

A. It is divided up at the end of the year.

Q. You would have had to employ them. You wouldn't have gone out of business?

A. Not exactly.

Q. What you actually made out of Fisher on this transaction, excluding your office expenses and your soliciting agents and these incidentals, was about 140 per cent.?

A. No, sir.

Q. You said in your answer to Mr. Dey——

Mr. DEY: On the transaction?

43 Mr. RAWLINS: The transaction you are suing on.

Mr. DEY: The whole transaction.

Mr. RAWLINS: No; about the labels you expected to make 140 per cent. That is the amount you claim upon the original cost?

A. This 140 % includes, as I said, the running office, soliciting expenses and their risks.

Q. Ordinary incidental expenses with your business?

A. They are very heavy.

Q. Just like a merchant, he sells his goods at 40 or 50 %; he has to pay his clerk?

A. The originating of the design is not included in that.

Q. Did you pay anything for the originating of the design?

A. We did.

Q. To whom?
A. To the artist who made that.
Q. Who was the artist?
A. I don't know; several artists worked there.
Q. Who was the artist?
A. I don't remember; there are several artists working there.
Q. You don't know how much you paid him?
A. No, sir; I could have figured it up if I had known this was coming.
Q. You said you wanted 75 cts. a thousand for those labels?
A. Yes, sir.
Q. And finally you consented to furnish them for 55?
A. Conditionally with the quantity.
Q. You represented to Fisher they were worth 75?
A. The label we had was worth that.
Q. That was the label, wasn't it?
A. It was slightly changed afterwards.
Q. Now, passing down to some other articles, the contract, I believe, does not fix the price of the stationary. These are samples of the stationary, are they?
A. Yes, sir; they are.
44 Q. You said that stationary of that description was worth $14.75 per thousand?
A. That was our standard price.
Q. That is what is ordinarily reasonable charged by lithographers of stationary for that style and make. I am not asking you what your particular charge is. What is the reasonable charge and was the reasonable charge in 1890?
A. Where the design must be originated?
Q. I am not asking you anything about the designs. There is the sample. Taking all that is connected with the making of that in the quantities specified in this contract, what would be the reasonable, ordinary charge or market value of such stationary?
A. As far as I know, $14.75 is reasonable.
Q. Don't you know that is six times higher than lithographers charge?
A. How much?
Q. Six times higher?
A. I don't know that.
Q. Don't you know that the reasonable charge for stationary of that design is not to exceed $2.75 a thousand?
A. I don't know.
Q. In quantities such as are provided in this alleged contract?
A. I don't know. That is ridiculous; it is a ridiculous price.
Mr. COTSHAUZEN: Assuming, you mean?
A. Assuming.
Q. You say that is a ridiculous low price?
A. I said so.
Q. I suppose you say no lithographer would make an article at that price?

A. There may be lithographers that will give it away with a bonus.

Q. Didn't you know that when you put in that agreement you wrote in there, "Prices to be fixed at our office"?

A. I didn't know.

Q. Did you put that in there?

A. I think it said in the agreement that prices are at our
45 Milwaukee office, by which I mean that the goods were; those were the prices of the goods at Milwaukee; we don't pay freight; that is the meaning of that.

Q. You didn't pay the freight?

A. I didn't.

Q. You didn't cause it to be?

A. We didn't.

Q. You didn't deliver the goods to Mr. Fisher?

A. I didn't.

Q. You didn't cause it to be done?

A. They were delivered at Milwaukee to the Fisher Brewing Co.

Q. They were delivered to the railroad at Milwaukee?

A. Yes, sir.

Q. That is the only delivery you ever made?

A. That is the only delivery we ever made.

Q. Had you made a sketch or caused a sketch to be made of the bird's-eye view of Salt Lake City?

A. Yes, sir.

Q. When?

A. Spring of that year.

Q. What time in the spring?

A. Very early.

Q. How long before the 30th of March?

A. Oh, it was months before that the sketch was made out here by artists.

Q. Months before that?

A. Yes; some 3 or 4 months artists were out here.

Q. All preparations had been made for the bird's-eye view before that time?

A. Preparation had been made for the bird's-eye view before that time.

Q. Did you have a sample or sketch of the bird's-eye view at the time?

A. I did.

Q. And that was already then for printing?

A. It was not.

Q. You had taken all the necessary steps to print it, hadn't you?

A. We had taken all the necessary steps to sketch and design it—compile it.

Q. You had designed it, sketched it, and compiled it?

A. Compiled it; we hadn't lithographed it.

Q. You hadn't yet lithographed it?

A. No, sir.

46 Mr. RAWLINS: Do I understand, Mr. Dey, that this witness has testified to any delivery of this document sued on in the complaint?

Mr. DEY: Yes; he was called originally, identified the signature, and testified to the exchange of copy.

Mr. RAWLINS: They examined him with reference to that. I desire to put some questions to the witness to show that while the paper was handed he took the paper away after the alleged signing by Mr. Fisher; that it was done under circumstances and with such intent that it was not designed or intended to take effect as a delivery of a contract. This evidence is not offered for the purpose of adding or varying the written instrument—the terms of the written instrument—but to show the instrument was never so delivered. We are entitled to cross-examine upon that question, which will come up. If your honor has any doubt upon our right to do this I would like to submit some authorities.

The COURT: I suppose upon the delivery of this copy to the defendants.

Mr. DEY: Certainly.

The COURT: I think they have a right to enquire as to the delivery.

Mr. DEY: Note an exception.

Mr. RAWLINS: Of course, it being proper cross-examination, I would ask the privilege of proceeding step by step because this witness is hostile. This evidence at this time I desire to be applicable with reference to the question of delivery.

Q. You testified the other day that you wrote out this instrument yourself; it is your handwriting?

A. Yes, sir.

Q. You wrote it out continuously, did you not?

A. Wrote it out while talking on the various subjects.

Q. Then you had the papers before you and you wrote one sentence after another?

A. I wrote it out while we were talking on the different subjects, stopped, and went on again.

47 Q. Until you got through?

A. Yes, sir.

Q. Did you tell Mr. Fisher that you were travelling in behalf of the American Publishing Co.?

A. I endorsed myself as treasurer of the American Publishing Co.

Q. After you had written out this paper and you had asked Mr. Fisher to put his signature to it, didn't he decline to do it and say that he had no use for that stuff, and that he didn't know anything about the prices of it, and he didn't want it? Didn't you thereupon say that it didn't mean anything, that it was Sunday, anyhow, and that what you wanted it for was merely that you might have a schedule of the articles, so that in future if he wanted anything he could order them; you got his signature endorsed on the paper to show your firm that he had been called upon, and that this didn't mean anything more than that?

The COURT: I am disposed to hold he can answer that question.
Mr. DEY: Note an exception.

A. I didn't.

CHAS. J. SMITH, being recalled, testified that $14.75 in lots of 10 M, more or less, was a fair price for designing and lithographing such stationery as the agreement called for; that the ruling and customary price of similar work at that time ranged from $12.00 to $15.

JOS. R KUSCHBERT testified that the customary and ruling price of stationery like that ranged all the way from $12.00 to $13.00, $14.00 and $15.00 according to the amount of work, engraving and quality of paper.

JOHN MONTGOMERY, JR., testified that in 1890 he was the secretary of the Salt Lake Real Estate Exchange; that the exchange, at one of its regular meetings, adopted a resolution as follows:

"At the regular weekly business meeting of the Salt Lake Real Estate Exchange, held in the exchange-rooms, on South Main street, in the city of Salt Lake, on Wednesday, December 31, 1890, the following resolution was introduced and unanimously adopted, to wit:

48 & 49 "Whereas, the American Publishing Company has exhibited to us proof of the bird's-eye view of Salt Lake City, prepared at the instance of this exchange, which view is a faithful and beautiful representation of the city and surrounding country, and in full accord with the sketch heretofore submitted to the exchange by said company.

"Resolved, That this exchange accept such picture, and commend it to the country as a faithful bird's-eye perspective view of Salt Lake City and its surroundings.

"Resolved, That the publishers of said picture be and they are hereby requested to add to the title of said picture the statement 'Prepared under the auspices of the Salt Lake Real Estate Exchange,' and that said publishers have a copy of these resolutions.

"JNO. MONTGOMERY, *Secretary.*"

Whereupon plaintiff rested.

Defense.

Defendants' counsel offered in evidence the deposition of J. C. WILLIAMS, of the city of Denver, who testified in substance:

I was employed as book-keeper by the defendants at Salt Lake City, from the 10th day of April, 1885, up to the 1st day of September, 1891. I had full charge of all purchases of stationery for defendants during the time of my employment.

I do not remember the exact date when I first met any person connected with, or claiming to be connected with The American Publishing Co., plaintiff herein, or the Beck & Pauli Lithographing

Company, but it was in the early part of the year 1890 a Mr. Smith came to the office of the defendants and introduced himself as being a representative of the Beck & Pauli Lithographing Company. He had sketches, and samples of labels, letter-heads, bill-heads, statements, note-heads, memorandum sheets, and some small advertising cards. Mr. Fisher, Mr. Smith and myself were present at this time.

Mr. Smith produced the samples and sketches referred to and asked Mr. Fisher to O K them, which he did by writing his name on each sample or sketch. Mr. Fisher then told him that he would take a million and a half of labels, and turning to me he asked what we needed in office stationery. I then asked Mr. Smith for prices on the various kinds of stationery, and was informed by him that he could not then give us prices, but that he would send our order in to his house and advise them to give us prices at once by letter, and then if the prices were not satisfactory we would not be expected to place an order, I then upon these conditions gave him an order for 10,000 letter-heads, 10,000 note-heads, 10,000 statements, 10,000 bill-heads, 10,000 business cards, 6,000 small advertising cards and 1,000 bank checks, and particularly informed him that we wanted no memorandum sheets or small letter-heads; the kinds of stationery and number of each kind were jotted down upon a piece of paper by myself and handed to Mr. Smith.

Mr. Smith came to the office of the Fisher Brewing Company again some time in December, 1890. Mr. Smith, Mr. Fisher and myself were present at this time; he brought with him a sketch of the view of Salt Lake City with the advertising card of the brewing company printed thereon, and asked Mr. Fisher to O K same, but Mr. Fisher expressed himself as not pleased with the sketch. Mr. Smith then told him that the sketch was to be passed upon by the Real Estate Exchange of Salt Lake City and if not approved by them the Fisher Brewing Company need not take any views. He then asked how many we would want, and Mr. Fisher said 200. I then suggested, as the views were for our customers out of the city, we had better take 250, to which Mr. Fisher assented. I then asked Mr. Smith at what price he could furnish that number, and he said they would cost 80 cents each, and upon this order Mr. Fisher O K'd the sketch; Mr. Fisher also said to Mr. Smith at this time, Be sure and get those 300 bock cards here by about the 1st of April, and upon inquiry from me stated that he had ordered 300 bock-beer cards to cost 37½ cents each. This was the first intimation I had received of such an order.

In regard to the letter of September 13th, 1890, (see folio 32 *ante*) addressed to the Beck & Pauli Lithographing Co., Milwaukee, Wisconsin, signed by the A. Fisher Brewing Company, it was written by myself upon receipt by the Fisher Brewing Company of a box containing a small amount of stationery. I knew the work was the same as the samples or sketches shown me by Mr. Smith, at the time we gave the order for the stationery above referred to.

There was no invoice sent with this shipment, nor had we re-

ceived any letter quoting prices on the stationery. I supposed at this time that this shipment was merely a sample lot, and as we were not in need of any of the stationery received at that time, excepting the check book. I unpacked the box, counted the articles and placed them in our stationery case. As samples of each kind of stationery ordered had been sent, excepting the small advertising cards I immediately thought of them and requested that they be sent, that is a sample of them as I supposed the other articles
51 to be. Before writing I asked Mr. Fisher if he knew the name of the firm from whom the stationery came, and he said that he did not. I then examined a note-head and found thereon the name of the Beck & Pauli Lithographing Company. I then wrote this letter and I think upon the same sheet from which I got their name. At that time I had no knowledge of the existence of the written proposal of March 28th, 1890.

A bill dated December 15th, 1890, for $181.85 was sent us by mail and received January 24th, 1890, (this bill is set out at folio 27 herein) and the bill for $183.85, dated December 15th, 1890, was brought to defendants' office early in February, 1891 (this bill covers the same articles as the other) by Mr. Smith who wanted to collect it. All of the articles mentioned in these bills, excepting the 1,000 letter-heads $8\frac{1}{2} \times 5$ were ordered at the time, and in the manner I have stated.

Regarding the letter of January 24th, 1891, (set forth folios 36 & 37 *ante*) addressed to tho plaintiff and signed by defendant, it was written by me upon receipt of bill referred to as "Exhibit A." I meant by the expression, "whenever you see fit to complete our order and ship and invoice properly," etc., that when the order referred to above was fully completed and shipped as agreed and prices were made satisfactory as promised, and the invoice and bill was properly made out then payment would be made promptly. By the expression, "shipped properly," I had reference to what Mr. Smith said at the time the order for the stationery was given, he stated that there would be a full car-load of stationery for their customers in Salt Lake City and that the car would be consigned either to himself or to one of the parties ordering goods from his house, thereby saving to each customer nearly 50 per cent. on freight charges. And he was positively instructed, both by Mr. Fisher and myself to ship only in that manner. The only orders that had been given to my knowledge by the defendants were those previously mentioned. I had then no knowledge nor had I ever seen the proposal of March 28, 1890, until after that time

The bill of plaintiff to defendants of January 30th, 1891, for $2,045.00, (identical with bill at folios 28 and 29 herein), was brought to the office of defendants about February 23, 1891, by Mr. Smith. He said that the goods had just arrived at the freight depot and that he desired to collect the money therefor.
52 All of the articles mentioned therein, excepting the eight and one-half thousand letter-heads and the 10,000 envelopes, were ordered at the time and in the manner heretofore stated, and

the only articles upon which a price had been made to my knowledge was the 250 views of Salt Lake City.

No order at any time had been given for the small letter-heads or the envelopes to my knowledge.

In regard to the bill dated January 31, 1891, from plaintiff to defendants for $16,132.50, (identical with bill at folio 30 herein), it was brought to defendants' office about the 1st of March, 1891, by Mr. Cotzhausen.

A lot of stationery goods was shipped by the plaintiff to the defendant by freight and billed as 18 and 6 boxes of paper, making a total of 24 boxes. The six boxes consigned and billed January 30, 1891, and the 18 boxes consigned and billed January 31, 1891, and weighing 2,950 and 10,230 respectively. They arrived about the 23d of February, 1891, and were received from the railroad company upon representations made by Mr. Smith at the time he presented said bill for $2,045.00, that there was a full car-load of stationery at the depot consigned to him for their different customers, and that our goods were also in the car, that if we would pay the total freight that he would instruct the railroad company to deliver the car to us, and would collect the freight charges due from their other customers and return same to us and I then at the urgent solicitation of Mr. Smith made out a check payable to the railroad company for, I think, $380.00, to cover the freight charges on the car. The teamster of the defendant was then instructed to go to the depot for the goods; when he returned to the brewery later we learned from him that there was fully one-half car-load of stationery marked for the defendants. The goods were then brought to the brewery by the teamster and at Mr. Fisher's instructions were unloaded into the bottling-house, and some time afterwards taken to the brewery, where they were stored, and up to the time I quit the employ of the defendants no part of the goods had been used by the defendants.

Regarding the letter of defendants to plaintiff, dated February 26, 1891, (set forth at folio 42 *ante*) it was written by myself. Mr. Cotzhauzen was in the city at the time and called at the office of the defendants, when complaint was made to him that goods had been shipped that were not ordered, and that extravagant, excessive and extortionate prices had been charged on what goods had been ordered. He said at the time that he had no authority to
53 remedy the matter, and advised us then to write to his house, whereupon I wrote that letter. I was *was* familiar in January, 1891, with the prices on all office stationery which was used by the defendants. The prices were excessive to an extent of $12.00 per thousand upon the letter-heads, note-heads, bill-heads, statements, business cards, checks and advertising cards. The reasonable market value of these articles at that time was $2.75 per thousand in the quantities set forth in said bills.

The defendants in their business were not in need of the quantity of stationery, and other articles mentioned in said bills, excepting some advertising cards and some business cards. I mean by the advertising cards, small cards, and the bock-beer hangers. In

my judgment, basing same upon the business the defendants had been doing prior to this time, and taking into consideration a fair average yearly increase in the business it would take them in the neighborhood of twenty-five years to consume the stationery and other goods billed to them.

Cross-examination:

I never met Mr. Kuschburt at any time or place, and have no knowledge of his submitting any sketch to defendants for approval. The first information, or intimation of the existence of the written proposal of March 28, 1890, I received from Mr. Cotzhausen in defendants' office about February 25, 1891. Mr. Cotzhausen referred to a contract he had in his conversation with Mr. Fisher. I asked him to let me read it. He handed a paper to me, which was written in the shape of a proposition from the American Publishing Company to the A. Fisher Brewing Company. I read it and made a written copy of it.

I think it was on or about February 24, 1891. Mr. Smith came to defendants' office and again asked for a settlement of the bill for $2,045.00 which he had brought there the day before. A settlement was refused by Mr. Fisher, who claimed that no order had been given. In the course of conversation Mr. Smith referred to a written proposition, or contract that the plaintiff claimed to have with the defendants, and said that the paper or contract was at their house in Milwaukee. After he had gone and upon the same day at Mr. Fisher's suggestion I wrote a letter to the American Publishing Company asking them to mail us a copy of this proposal or contract; no copy was kept of this letter. (See folio 40 *ante*.)

Mr. Cotzhausen called at the office of the defendants on or about February 25th or 26th, 1891, and produced the original proposal or contract, and at his advice and suggestion I wrote the letter dated February 26th, 1891, as stated in my direct examination.

54 I wrote the letter of February 26, 1891, at the direction of Mr. Cotzhausen. I obtained the information on which to base the statements made in that letter from Mr. Fisher and Mr. George Martin, the foreman of the Fisher Brewing Company, at its office and also base the statements partly upon my own knowledge, that part referring to the one million and a half labels and the three hundred beer cards.

Regarding statements in the letter to the effect that "on March 28 last, we placed an order with your Mr. Cotzhausen for one and one-half million labels for 55 cents per thousand, 300 bock cards at thirty-seven and one-half cents each," I got that information from Mr. Fisher after he had conversed with Mr. Cotzhausen that day in defendants' office. Proofs of some office stationery were submitted to Mr. Fisher by Mr. Smith, but I do not know that it was pursuant to the writing of March 28th, 1890. Mr. Fisher did not see or know the contents of any of the letters written by me before mailing them.

In regard to the statements made in the letter of February 26th,

1891, that the copy of the proposition left with the defendants was taken from them by one of the plaintiff's men, I have no personal knowledge of the matter, nor do I know where the proposition was kept. I do not know who took it away. I was not present at the time it was taken away. In regard to the letter of January 24th, 1891 I meant by the words "so far owing to your peculiar and mysterious manner of doing business as indicated by your conduct towards us, we have refrained from using any of the order now here (other than the check book)," that when the first box containing stationery was received by the defendants, September 13th, 1890, and no invoice or bill was received for the said box of stationery, until the 24th day of January, 1891, it looked to me like a very peculiar and mysterious manner of doing business. Mr. Fisher had no knowledge of the letter having been written. I was present when Mr. Smith presented a proof of the panoramic view of Salt Lake City, with compliment card of defendants on with approval by Mr. Fisher, but Mr. Fisher did not have his contract of March 28th, 1890, at that time. I left the employ of defendants about September 1st, 1891, and engaged in the saloon business at Salt Lake City for about eight months.

A. FISHER was thereupon called and sworn as a witness in his own behalf.

At this stage of the proceedings, the plaintiff interposed an objection, to any and all evidence under the answer tending to establish the pretended plea of fraud or false representation, as therein set out at length, because insufficient in law as matter of
55 defense. This objection was overruled by the court; to which ruling the plaintiff then and there duly excepted.

Thereupon the defendants prayed leave to file the following:

Amendment of Answer.

Now come said defendants and by leave of court first had and obtained, filed the following amendment to the answer herein, to be inserted before the counter-claim, and allege:

That, to wit, on or about the 30th day of March, 1890, said plaintiff, by its said agent, A. E. Cotzhausen, represented to the defendant A. Fisher that they had prepared a bird's-eye view of Salt Lake City and had engaged to deliver a large number of copies of the same to the Real Estate Exchange in Salt Lake City and to the Union Pacific, the Rio Grande Western R'y Companies, and chamber of commerce, and that the price which said parties were to pay for said views was $1.25 per copy; that by reason of said engagement said plaintiff had prepared the necessary sketches for said view and that they could afford to sell and deliver to said defendants the same at a much less price, to wit, ninety-seven and one-half ($.97½) cents per copy, but that said views were reasonably worth much more than said sum.

Said plaintiff, by its agent, further represented to said defendant

that certain sketches and articles of stationary, particularly set forth in the document alleged in said complaint, were made by them and were of a superior quality, and that the prices as stated in said agreement were below the reasonable market value thereof.

That said defendants were wholly ignorant *that* the value of any of said articles mentioned in said document and of said bird's-eye views, with the exception of the bottle labels and buch cards mentioned therein, and that at the time said representations were so made to him by the agent of said plaintiff he had no means
56 of informing himself as to the reasonable value of said articles, and the value thereof was peculiarly within the knowledge of said plaintiff and its agent.

That in truth and in fact said plaintiff had no- made a contract to furnish said railroad companies or said Real Estate Exchange with the said bird's-eye views of Salt Lake City, and the said parties had not undertaken to pay therefor the sum of $1.25 per copy or any amount per copy exceeding 75c., and the said bird's-eye view and the said articles specified in said document set forth in the complaint were not of the reasonable market value as therein stated, but the prices so fixed were some six times higher than the reasonable value of said articles, and each and every of said representations was false and fraudulent, all of which was well known to said plaintiff and its agent, but of which the said defendant was wholly ignorant.

That by reason of said false and fraudulent representations said defendant was induced to sign the proposal aforesaid and not otherwise, and that said document was afterwards altered as hereinbefore alleged.

RAWLINS & CRITCHLOW,
Att'ys for Def'ts.

(Verified by A. Fisher Dec. 9, 1892.)

To this amendment the plaintiff objected on the grounds:

1st. Because insufficient in law upon its face.

2d. Inconsistent with the former plea.

3d. A plea of fraud ought not to be amended on trial so as to add new ground thereto.

4th. The plaintiff is taken by surprise, and not prepared to go into a new issue.

But the court overruled the objection, and allowed the amendment, giving the plaintiff the election, if taken by surprise, of asking and obtaining a continuance, the defendants paying the taxable costs of the term; to all of which rulings the plaintiff duly excepted.

Leave thus to amend having been granted, the plaintiff moved that the defendants be made to elect upon which of the two pleas of fraud they now intended to rely, for the reason that the fraud set up by way of amendment was inconsistent with the plea in
57 the original answer; which motion was denied by the court and an exception duly entered.

The plaintiff, being unwilling to submit at this stage of the proceedings to a continuance of the cause on receipt merely of the tax-

able costs of the term, a further exception was duly taken, and thereupon counsel announced their readiness to go on with the trial.

The examination of A. Fisher was resumed and continued as follows: I met Mr. A. E Cotzhausen at the brewery on the 30th of March, 1890; it was on one Sunday afternoon, about half past two. I had met him in town the day previous, when he told me he would come down some time and see me in regards—he says he wants to buy real estate; so when he came down he asked me whether I had any real estate for sale; I told him I didn't have any for sale; all the land we had we needed. I knew beforehand he was connected with a lithographing house and then he spoke to me about it, told me he was the secretary of the firm; that he used to be a traveling man for them, and then he suggested if I would not like to have a trade-mark made for our beer labels. I had been thinking of getting a trade-mark made some time before. I asked him about these trade-marks—in fact he already seemed to be familiar with our beer labels—he said he had seen our beer label, which we had used on our bottles, also inquired the price which we had been paying, and he talked to me how many colors our labels had then; he liked to make us a label, which would be much stylisher, with our trade-mark on; he asked me what I paid. I told him I think the price was 55 cents at the rate of half a million at the time; this I told him was about as much as I used in a year. So he suggested that he would make us a label for 75 cents a thousand with the trade-mark inserted. I told him I did not want any label at such price, and at last he said, if you get a million and a half—that would be about right—you are using now half a million, a million and a half would only last you three years—so he would make them at 55 cents. Remember he says I cannot make you them labels right away, we could only make them between when business is dull; I will furnish you with labels so you won't get out of stock, and you will always have some on hand—we will make you some now and then make you some next year, make them at one time when I have time; but I won't let you get out of stock. After talking things over, I told him "Well, I will take a million and a half;" but he says "Never mind" then; "You don't need to give an order for them now." I said certainly I wouldn't give you any order now without seeing sample. He says "Yes, I will get you a trade-
mark made, then I will submit you samples, and then you
58 can judge." Then he furthermore said "Now the best way
you could do, get yourself a trade-mark, or we get it made, it don't cost you anything; if you take these labels, we can afford to have that trade-mark made; leave it with us, and then we can make up all your stationery; we can do you better work and cheaper work than any other lithographing house out." Then he says "I will tell you what I will do"——

PLAINTIFF'S COUNSEL: "We desire at this time to object again—once for all, without further repetition—to all of the foregoing testimony, and any and all parol evidence of a similar nature, because not warranted by the pleadings and at variance with the written

contract between the parties." The objection being overruled, an exception was duly taken.

The witness then continued: Then he told me "Let me submit to you samples for what men in your business need, and any time you like it, you can get made anything that you want, and as many as you want at any time." He says "We will have the stone there then, we will have your samples and trade-mark there, we can make them so much cheaper;" and after that he told me something that he had a lot of artists here in town taking sketches; that he was making a bird's-eye view of Salt Lake City for the Rio Grande and Western R'y Co., for U. P., for the chamber of commerce and Real Estate Exchange; he told me of how many thousands, I don't know how many, but it seems to me it was something like fifty thousand he was making; it would be distributed all over the country, and he told me it was a work of art, asked me if I would not take some of them. I told him I don't know; I asked what they would cost; he says: "Well, they do cost money, they got to pay me $1.25 apiece, but I will let you have them for 97½ cents, because as the work is gotten up any way, I can make them so much cheaper for you." I told him "No, I don't think I want any for 97½ cents." He says "You don't know, you see the sample once." "Well," I said, "If this is as you say I might take a hundred of them if you will let me have them as cheap as they can be made for; don't talk of no 97½ cents, for I wouldn't pay that for them."

Then he spoke to me about buck-beer cards; the way he described it to me I thought it was a pretty nice card; he asked me if he could submit samples of them; I told him yes, he could submit samples of them. He also spoke about a hanger. Then afterwards he pulled a few sheets of paper out of his pocket and said "I tell you what I will do; here, I will make a memorandum of what you might
59 need in the line of stationery and so on, and submit you samples and proofs, and if you want them why you can take them—you can take them any time you want them, I can always make you stationery. So he started to write, and asked me if I had not a beer label of ours handy, and I called George Martin, our foreman, who happened to be outside in the brewery. He went to the bottling-house and got a beer label, and after that C. wrote out this paper; and then after it was written he writes another, then he handed the one to me to sign, I said "I am not giving you an order for anything." "Well," he says, "This is no order; our company or firm, as a rule, when we drummers are out on the road—you see that it has happened that when these drummers have sent to their houses for sketches, they claimed they had been to certain firms and submitted the sketches. and after that it was found out that such was not the case; so since that, we have adopted the rule that if we send to our house for sketches, a communication will have to be signed by a responsible party from the firm that these sketches are to be sent to, and that is the reason I want you to sign it." He says "This is no contract whatever, and furthermore it is Sunday," he says "It would not be good anyway." Then I put my name

down to it, and he wrote out another one, and left that with me. I put that in the safe. After that, me and him walked out of the office to where a keg of beer was tapped, we drunk a glass of beer, he having the paper in his hand. He drunk his beer and walked back*ed* into the office, I drunk up mine, put down my glass, and then I just had seen, as he had the pen and ink and wrote something more on that paper; I didn't know what it was, he had folded it up, but I had seen he had finished putting something on it; that was all for that day.

Exhibit 2 was not read over to me, but I put my name on there. The words "All terms and conditions included in above, approved, read and agreed," were not in there when I signed it; there were no such interlineations as that; nor were the words "Signed in duplicate" on there when I put my name there. I never saw the paper after I had signed it; he took it.

Q. Were you at all familiar with the price of any of these articles, which he mentioned to you at the time?

Objected to by the plaintiff; objection overruled and exception taken.

A. I was familiar with part; for instance I knew what labels were worth, and also buck cards; I was not with the price of the other things. Our book keeper Williams had attended to the buying of stationery for our firm.

I signed this document on the reliance of Cotzhausen's
60 statements that he simply wanted to show he had visited our firm. The paper which he left with me I put into the closet—into the desk; I did not read it. Neither did I read the one fully, which C. took with him; I just kind of glanced over it when he started to write—when he says "We will submit to you so and so" that is about all I read of it; "We will submit," etc., on approval, on what is agreed—read it, though not the whole. I did not see anything as to quantities of these different things; he told me some of the stationery was 10,000 and so on, and I said I didn't think we will buy in these lots; this was before he put them down. He said "That don't matter, you can take all you want, we will let you have that many if you want to."

I don't know what became of my copy, I have seen it at one time about a month afterwards; that was the last time I saw it. Mr. Smith happened to come there with sketches, I don't know exactly what it was, and he asked me if I didn't have some kind of a duplicate agreement somewhere; I told him I had one and I gave it to him; he read it through, and after he had read it through, I put it back again in the same place. I never saw it after that.

Q. Now, as that copy was read over to you, or as you saw it, did it contain these words that are interlined in this document?

A. No, I didn't notice that in that copy—no I didn't. I believed the representations and statements made by Mr. Cotzhausen to be true, and in reliance on that I put my name on the paper in the manner I have stated. I had no information or knowledge at that time that they were untrue or false.

Mr. Smith came there, he brought with him just a kind of rough outline of stationery, I believe it is called sketches, and he asked me if that suited; I told him I didn't know, it might suit after it is finished, and he asked me to O K them.

Q. What did you mean by O K them?

A. Well, if they would suit, after they were finished, I wrote my name on them in that way, I simply put my signature on the back of them.

Q. Do you remember whether those words O K were on at the time or not?

A. There was nothing on them, I just put my name on the back, the balance is not my handwriting.

After I read that copy down there, about a month after the 30th of March, when Mr. Smith came around, I never saw that copy of that agreement again. I saw the original which C. showed me towards the latter part of April, 1891, when the goods arrived here.

61 Q. Was there any writing upon the cards or other exhibits (referring to Exhibit 7) above your name?

Objected to; objection overruled; exception by plaintiff.

A. It was all a blank, only my name was on, nothing else. The words "Accepted as per agreement of March 28, 1890," were not on there. The same is true as to all the cards or exhibits that I ever seen. So was the card, just a blank, which shows the words "O K silver, blue, and black," and my signature below in pencil.

I don't know how many times Smith was there; he was around often; he was around with samples, submitting sketches when Williams was present on one occasion. Williams asked me at one time if I had ordered any stationery; I told him I hadn't; I told him those parties were making samples, and when they suited we just ordered from them any time we wanted to. Well, I told Williams "If you need any of this stationery, give them your order," and I remember Williams gave him an order for some kind of stationery—of course I left that to Williams altogether; I don't pay any attention to stationery.

For the beer labels I gave Smith an order myself. After the label was complete and suited, I told him I would take a million and a half of those labels at the rate of 55c. Smith said they would send them. I also ordered 300 buck-beer cards at 37½c. I am not quite sure whether these orders were both made at the same time, because Smith was there so often. I also remember that the order was given for Shakespearean cards at the time he submitted those sketches. We really needed those Shakespearean cards long before this, every day in the early part of the year; we were in need of some advertising matter, and we told him as quick as they have them ready to send them; I told him I would take a thousand or two—provided the proof came out all right, which it did, then the real order was placed, just as quick as we approved them; they sent us six thousand, a thousand of each—they were ready in the early part of the summer.

Smith came with the bird's-eye view the latter part of December; Williams was present; I signed my name to the proof, Exhibit 11. When I put my signature on, there was nothing written on there at all in ink. What now appears there, was not put on with my knowledge or consent. We made some objections when Smith presented the proof; the pencil figures he put on at the time. There was something said about the Real Estate Exchange accepting or approving of it, there was also something written on there at the time, in relation to that matter; it was written on the back with lead pencil.

62 Q. Did you ever consent to its being put there?

Same objection, ruling and exception.

A. No, I didn't.

At the time sketches were submitted in July, October and December, there was no copy of the proposal of March 28th present at all. There was something said about it at one time—it must have been in July. When Kuschbert came there he had some sketches and proofs. When he brought all these things I told him there is some copy of an agreement somewhere, I am wondering where it is. I looked for it and couldn't find it; I looked all over for it—I looked through the desk, I looked through the safe, I believe, for about an hour, I looked through the office and desk, went home and looked through all my clothes, thought probably I had it in my pocket somewheres; then I told him, "Now, be sure, when you get home to send me a copy of that paper, of that agreement," which he promised he would—but he never did. I never signed any paper in regards to the agreement, I simply wrote my name on the back of the cards. I do not remember ever having seen the proof of hanger (Exhibit 9) or ever having signed it; if I have, I have forgotten it, but I do not remember of ever having seen that; it looks like my signature, at the same time I doubt it. I remember the compliment card, my signature was on it. I think this was one of the first ones presented.

I remember the small shipment that came in September; Williams asked me the name of the firm by whom it was sent, and I told him I did not know the firm's name; he said, Well, I can find it out right here on the stationery; it is the Beck & Pauli. No bill came with it—nothing; I don't know as to Williams writing the letter of September 13th. Another box came later on in December; I don't remember what that contained; I didn't look there much; I had an idea it was some stationery that Williams sent for. The next shipment came about February 23d. Mr. Smith was there; he presented a bill for two thousand and odd dollars. This was while the goods were at the depot; he told us we should get them. Williams asked him, "What is the matter with you folks, why don't you show up a bill; we can't get any bill out of you folks; you are a kind of a peculiar set of people," and then Mr. Smith put his hand in his pocket and pulled his $2,000 bill out, which he said was the bill for the goods that had arrived. He wanted us to give him a check to pay the freight. He said Wagener's goods were with it, and we had

an idea there was a whole lot of other goods, because he remarked before that he would send a car-load of goods to the real-estate men here. He said he wanted the money to pay that freight, $380 to pay on that car. We telephoned over to the freight office, and then came the answer $380 and some odd cents, so Williams wrote out a check, I signed it, called two of our teamsters to get the
63 stuff. Smith said if we paid the freight on the whole car he would collect from Wagener and let it go on our bill, that is Wagener's freight, which he said was in the same car. The two teams started off to get the goods and then afterwards we found out in some way that $380 represented the freight only on our goods, and then I argued the matter with Smith for a long time regarding that bill which he showed me, that bill which contained a million and a half labels, 250 views of Salt Lake, buck-beer cards and some other stationery, and I asked him whether that was not outrageous, and he said that the Rio Grande people told him it weighed some twelve or thirteen thousand pounds; I said it was impossible; I understood the stuff did not weigh that much; Mr. Smith thought I didn't understand it. By reason of these statements the goods were hauled away and taken into our bottling-house. The reason I argued the matter with Mr. Smith was that I had already heard of the firm's business in Colorado, and I was warned and I wanted to be careful. Well, I was suspicious, and I had the man telephone to the Rio Grande to see the driver, tell him not to bring the goods away; that is what I meant to do, but through Smith's statement, as he said there was nothing at the depot but what is in that bill which he showed before, I let the goods come. I told him there were several articles in there which I did not order, I mean in the $2,000 bill. He assured me that the firm would make things all right. I told him You charge 97½c. for the views, when you sold them to me for 80c. He said Mr. Cotzhausen will make that all right, they are nice people to get along with. I said I remembered I ordered 6,000 Shakesperean cards—where are they? They are not in; well, I don't know how it was, why they ain't here. I said the very stuff we wanted you didn't ship; we wanted them long ago, and with these statements I got the goods hauled over; the teamsters put that stuff temporarily in the bottling-house; I didn't know where to put it; Mr. Smith started off for town; came back again the next morning; we went into the bottling-house and looked at the boxes; he called for a hatchet, looked over the boxes and his papers, and finally tackled one of the boxes which contained views of Salt Lake City. I said, "They are our views;" he answered, "Yes." I took one out right away; I thought they were very good.

I never counted to see how many there were in that box; there could not be 10,000; it was a pretty heavy package for 250. He opened several other boxes, one with envelopes in; I said, "What envelopes, I don't remember anything about envelopes;"
64 Smith said, "You O K'd some envelopes;" I answered, "I don't remember anything about that." He opened about four or five boxes and I nailed them up again right there and then, most of them; afterwards the stuff laid in the road there,

and I had it sent over to the brewery to some place out of the way. T-e first time I saw the $16,000 bill I was at your (Rawlin's) office; I don't remember seeing the $16,000 — in our office.

Q. As soon as you found out the nature of the shipments, did you notify them that you would not receive them, if so, what was said about it?

A. I told Mr. Smith—well, as far as the stationery is concerned, I left that to Williams—but then the high prices he charged, that is what Williams told me then, what they were about worth; we had a talk about that, but he said that Smith said they will make that all right with us; "You just give me a check; they will fix that with you."

When Smith submitted the bird's-eye view for approval, I did not want any at first, in fact I didn't like them at all. So Williams said to me it will make a good advertising medium for a long time; we have not sent out anything, and it is a thing to be hung up if it is nicely made, and our trade-mark in there nicely, I think it would make a pretty good advertising medium. I told Smith of the offer which Cotzhausen made at one time, that I could get them at a reasonable price; and then I said I think we want 200, what would 200 be? Smith said, after a little hesitation, "80c." "Well," I said, "is that the cheapest they can be got?" He said "Yes that is the cheapest, we don't sell them any cheaper." I asked him whether they would sell them for 75c. He said "No." Then Williams said If you want to take 200, rather take 250, if we want to use them to send out to our customers; the buck-beer cards, of which we took 200, did not go around, we did not have enough for all. So I gave him an order for 250, and it was there understood that they should be 80c. apiece; Smith agreed to that and furthermore I told him "I will tell you what I will do; I am not much of an artist, and those views may be nicer than I know; they may be more striking to other people; I will take them, provided the Real Estate Exchange takes them. He turned the proof over then and put this writing in, that this change had to be made, with pencil and I signed my name right here (pointing to the place). In fact before I did sign my name there, we made him put in here, "provided they are accepted by the Real Estate Exchange"—no, "provided if endorsed by the Real Estate Exchange." Smith wrote this in light with a lead pencil, right on the back in here, and then he asked me to put my name in, which I did. I did not see him use any pen and ink at all.

65 The morning when Smith came down and opened the boxes, he told me that Cotzhausen was in town; I said I would like to see him. In the evening Cotzhausen came to the brewery. After a few introductory remarks, I started right away to ask him how he could send us that amount of goods; he said, "I don't know what they do in Milwaukee, I have got my office in Philadelphia, and tend to the business there, I don't know what they sent you." I asked, "Have you the original agreement with you, that paper which was written that Sunday?" He said, "I have," then he gave it to me, and I read it and the first time I read

it too, and then I handed it over to Williams to make a copy of it, and I read the copy. After Williams had taken a copy, we started to talk to him regarding the stationery, this $2,000 bill and of other goods which were not ordered, and as to the price of $14.75 a M, we showed him that we could buy lithographed stuff much cheaper. At last Mr. Cotzhausen said he wanted to settle that bill, he was here to settle it, he was willing to throw off about $600.00, he would take something like $1,400.00 for the whole bill; I said all right, we will settle on that basis. When Williams was in the act of making out a check, I called him into the back office, and I told him he could have that check provided he would give us that paper he held over us, then he could have it, and give a receipt that everything was settled between the publishing company and the brewing company. Then Williams spoke about the Shakespearean cards, which he wanted so badly. I said "Just let them go in, I don't want anything more to do with them, if we only get done with the outfit once." So when Williams made the proposition, C. would not do it, no he would not do anything of the kind; he jumped into his buggy and went off, and really that is the first time it dawned upon me that I was in the hands of confidence men; I never had an idea before because he would not settle. The reason he did not take that check, intimated to me that something was bad——

The COURT: Never mind, we don't want that.

On cross-examination A. Fisher testified:

Q. When you had all the stuff in your brewery you wanted to settle for all of it?

A. Deducting $600, you see, from the first bill.

Q. You had already $2,000 of this didn't you?

A. Yes.

Q. Mr. Williams made it a condition that he would draw a check for the amount of the first bill of $2,000 less $600 providing the publishing company gave up that paper which you spoke of?

A. Yes.

66 Q. If you would have carried that you would have made a big point, wouldn't you? Didn't you think so at the time?

A. Well, I didn't think so at the time.

Q. Well, the stationery which you had ordered, outside of anything else, amounted to about as much as that, didn't it?

A. No, I could buy that stationery for much less money at that time or now.

Q. You think so?

A. Yes, sir.

Q. Did you ever have any colored stationery with your trademark in in four prints—did you ever have any such kind before?

A. Well, I don't know much about these prints.

Q. Just tell us whether you had or not, you know.

A. Well, if I have got to tell you, I have got to tell you I don't know.

Mr. Keyser and myself have been in charge of this brewery about

eight years, doing a fair business. Since the boom of 1890 business has somewhat fallen back, not a great deal, hardly noticeable. The business from 1890 to 1891 was larger than during any other year. Our brewery was not largely interested in real estate; as to Mr. Keyser I don't know. I was not inclined to booming Salt Lake at that time alike with other people. Smith never showed me the paper from the Real Estate Exchange, introducing the Salt Lake view, neither did I ask for it. I did not know that the Real Estate Board endorsed it, nor did I know it until after its endorsement was published in the newspaper, which was after I signed my name.

I am 40 years old; I have been here about twenty years; I read and speak the English language. I don't know that my education has been any neglected. I would not like to pass on that myself. I would like somebody else to do it. I had a good schooling; am not blind; I am not generally drowsy; whether I am a good business man it is not for me to judge. Mr. Keyser who has a very large interest, entrusts me with the whole charge of the business; he spends most of his time East. I experience no trouble in transacting business generally.

In my experience as a business man, if I sign a valuable paper I would read it first. I was told that this was not a valuable paper, but a valuable memorandum. I wanted the memorandum, so that I could study it up at any time, and I suppose it was a correct copy. I don't know whether it was different from the one offered in evidence, I supposed both were alike.

67 The witness also testified that he did not remember signing more than one of the proposals. I didn't think it would be necessary. I was not asked to sign mine that lay in my possession. I could sign that at any time; that paper I carefully preserved in my desk. When Smith came there with the sketches and samples a month later, I took the paper from my desk and showed it to him; that was at the time when I "O K'd" the sketches.

Q. That is what you mean by your signature, isn't it?

A. Yes, by my signature I meant that the stuff would suit me provided I ordered it.

Q. You used the word "O K"?

A. Yes, sir.

Q. You meant to have your signature considered just what is now written over it, "O K"?

A. Yes, sir.

Q. Just what you meant?

A. Yes, "O K" in case I wanted to order any. Now really what I meant by that "O K," if they presented the right kind, it suited me—the work which was presented to me, it suited me—provided I wanted to buy it. I could not tell whether the copy which Smith and myself read at the time, before I "O K'd" the samples, differs from the paper which has been offered in evidence; I didn't read it. Williams didn't know anything about the paper, except what I told him of it. In February when the goods had arrived, Williams called for a copy of the original, which we studied over, as we had lost my own. We read it over carefully, my copy I lost or some-

body stole it. When I first missed it, I thought it was stolen. I knew Williams ordered stationery, I left that to him; though what he would order I left that to him, I would not bother with that. I heard Williams' deposition read wherein he tells us that he ordered 10 M of five different kinds, but that he did not order envelopes, or 3½ M of small letter-heads. They conferred together as to the stationery, what they would take altogether; I think Smith or Kuschbert told him in 10-M lot he could get it much cheaper than in 5-M lot. I suppose he ordered in that quantity, although some of it would have lasted us 25 years.

Q. What then do you now complain of as you ordered in those quantities?

A. For instance the labels—not the labels, the envelopes, a thing we don't use; I guess there is also some other stuff we can't use; I don't know anything about that stationery, I don't know how much and what is needed. I always left that to my book-keeper; I didn't assent to the order which he had given, because I didn't know what he had ordered; I think if he ordered it why he wanted it.

68 I myself ordered a million and a half of labels; we admit we took those labels, and we had to take them. So also the buck-beer cards, we ordered them, the price is right, nothing to complain of.

Q. The only fighting point then between us is that you say you only ordered 250 views of Salt Lake City, and that they sent you 10,000?

A. Yes, sir.

Q. And you say you gave no order for the envelopes, nor for the hangers?

A. Yes.

I was aware at the time of offering a settlement in February that the stationery, hangers, views and others bore our name and trade-mark, and were of no value to the publishing company, but that we could use them, and some of them at least we have actually used.

Q. You never made any tender nor offer to pay anything at all unless the plaintiff would throw up the whole contract, did you?

A. No, not otherwise.

Q. You say the words "Approved as per agreement" on all these various cards were written over your signature after you had signed?

A. Yes, sir.

Q. Now, taking this one for example (Exhibit 6) "Approved October 29, 1890, to go on back of small advertising cards," was that all written over your signature?

A. It wasn't there when I put my name there.

Q. Now, please tell us why you put your name there so far toward the bottom, on the corner?

A. Why I don't know; if counsel would explain why my name is so far up on the other, I don't know.

Q. Here is another card with a memorandum "O K silver, blue and black," do you mean to say those words were not on there when you signed?

A. They were not on there.

—. You directed that change to be made in the colors of your trade-mark, did you not?

A. Well, I guess I did, I suggested it, but it was not there.

Q. Now, without spending much time on these papers, we will take the Salt Lake view, paper about 3 x 5 ft.—I wish you would tell the jury whether you could have written your name in a more convenient space than by crowding it in where it appears to be now at the bottom of the approval? Look at it for yourself and see whether you can answer the question I ask you?

69

A. It was written where Smith told me to put it, if I wanted to O K it—if it suited me.

I am not aware that this Salt Lake panoramic view is a more elaborate piece of work than was ever gotten up in this country; neither did I know that a great portion of the Salt Lake public took a deep interest in it, except what Cotzhausen told me; I thought it was a nice thing to give to our customers. Selling beer in botties is part of our trade.

I had met Cotzhausen before in Kansas City at the brewery of Heim. He told me he was traveling for a lithograph-house; I suggested that when he came to Salt Lake City he come out to see me; I would be glad to see him; I did not at the time tell him I needed considerable work, or that I would most likely give him an order. I met him in Kansas City, about the 21st of February, 1890, and he came to Salt Lake about a month later.

Q. Now, Mr. Fisher, without going into any extended details, that first draft of the agreement was dashed down by Mr. Cotzhausen as you talked up the various subjects—the trade-mark, the views, the buck cards and others, was it not?

A. A kind of draft on a piece of paper; he would make a label and a trade-mark, which we talked over; I gave him my idea of what we wanted on the trade-mark; he informed me, instructed me, sketched on the paper, about how it would be done, gave me the idea.

Q. I mean the writing of the different subjects proposed, were they written down as you talked them over, one thing after the other?

A. Well, he told me he would put in what we might need in our business.

Q. And as you talked it over it was written down?

A. I don't know, I didn't watch any writing; he told me he would put my memoranda there.

Q. And the copy which you got was a clean-written copy?

A. I can't tell about that copy; the only one I do know is one that was written on the Midland Investment Company's paper, on the paper I offered him when he wrote. I didn't know what stationery cost before we got that big invoice from the Milwaukee house, afterwards I informed myself; Williams I suppose did, he always did the buying.

Q. Where did you learn that the check book cost $14.75?

70

A. Well, I didn't know exactly what check books are

worth; the check book is a small item anyway. That check book contained a thousand checks. I knew what it would cost when I ordered it; I guess they told me $14.75; that is what I guess what the bill calls for.

Q. They told you when you ordered that check book that that check book of a thousand checks would cost you $14.75?

A. Yes, but I should not consider that cheap from what other stationery is, such as I know of. As to the letter-heads, bill-heads, etc., I never learned what they would cost per thousand before I saw the bill.

The witness' attention was called to the original answer verified by him, wherein among other things it is alleged that defendants ordered a certain limited quantity of stationery and other articles at a price agreed upon at the time of giving the order, and the question was asked:

Q. Now, sir, if that be true that the prices for a limited quantity of stationery were agreed upon at the time the order was made, why then do you now say that you didn't know that the price of stationery was $14.75 per thousand?

The COURT: If you want to make any explanation, you can do so.

A. In regard to the stationery, Mr. Williams always ordered that; I did know what the price of the check book was, but I did not know the price of the other stationery. I don't exactly remember to whom the order for the check book was given; Williams spoke about it, and gave the order, that is he told the man he wanted one or two check books, and the man then handed it to me to sign, that is my recollection of it; I think I signed the written order.

Q. We also now desire to know whether you got out your copy or duplicate of agreement when Smith came there for the first time with the sketches?

A. He asked me—there was some additional stationery there, which he showed me; I asked him what is all this for; I was not acquainted with what they called letter-heads, bill-heads, memorandums, or many other things, and he called those things by name. Well, I really don't know what they were called; I heard him call off the sheets at the time I was there, such as it was with the kind of work, and he asked me—he asked me if there was not a memorandum here of all these things; I told him there is an agreement; so I unlocked the drawer and handed him that paper.

71 Q. You found it all right, and then you O K'd the samples, did you?

A. Yes, he told me what he called all the different things.

Q. Now, to close without losing any more time, do you mean to insist that you never gave any order for this work until the finished proofs of plates were submitted to you and found satisfactory?

A. No.

Q. Never any order of any kind, conditional or otherwise?

A. Well, there was one order given, that is before the order really was done, that is the Shakespearean cards.

At request of plaintiff witness here produced one of the checks furnished him as per invoice of December 15, 1890, which was offered in evidence and marked Exhibit 23.

On re-examination:

On the bill for 250 views, there was an overcharge of 17½c., on the ground that 80c. was to be paid, but they charged 97½c. The charge for the labels at 55c. is all right in accordance with the order. The stationery was a matter between Williams and Cotzhausen, which I didn't know about. A million and a half of labels would last us in our business about three years. We wanted the views to send them as a compliment to our customers, of which there were about two hundred in this western country; we don't ship out of the United States, nor do we deal with the Indian tribes. In the ordinary course of business we could need about five or six thousand advertising cards to send out to the trade, that number would last us for that kind of advertising a year; it would not do to buy too much at a time, the next time we would get something different, the old thing would cease to attract attention; we could not have made any use for 300 M advertising cards; if I had any idea that they would prove an expensive article, I would not have needed more than about 300 or 400 of each.

We had a good many customers right here in town outside of the saloons, to whom we sold bottle beer. We were not particularly catering at that time for the family trade or private households, but we have put up signs in street cars, where they are yet to this day, substantially to the effect "Bottle beer supplied to families." I don't remember telling Mr. Cotzhausen as early as our first meeting at Kansas City that we had any intention of going more into the sale of bottle beer, and expected to extend our trade especially in that direction; I don't believe I did, because our conversation was very short there. I don't believe we had time enough to talk about it.

72 C. J. PAULI, sworn as a witness for defense, testified:

That he resided in Milwaukee since 1876, and had been engaged in making bird's-eye views and in partnership with a Mr. Beck, under the firm name of Beck & Pauli, lithographers; had been in business for nine years. They carried on the business of making bird's-eye views and lithographing. During the latter part of the nine years they carried on the business of general lithographing on a small scale. He then formed the Beck & Pauli lithographing business six years ago, and continued with that concern half a year. Its business was general lithographing and bird's-eye views. Since that time he has been engaged in his former business of making sketches for bird's-eye views, canvassing for them, lithographing them, making sketches for engravings, photo-engravings, taking orders, making India-ink engravings for photo-engravings, etc.

That he was familiar with the value in 1890 and 1891 of advertising cards, hangers of all descriptions, different kinds of stationery, letter-heads, bill-heads and statements.

The witness being interrogated whether he had made an estimate of the market value of the various articles and things embraced in the memorandum of agreement, answered in the affirmative and thereupon the following question was put:

Q. Are you able to state what the aggregate market value of all these things is, including the entire expense connected with it?

To which question the plaintiff objected, but the objection was overruled, and an exception duly taken, whereupon the witness answered substantially, referring to papers and figures in his possession; I should value the various kinds of stationery at $6.50 per thousand, allowing a profit of about 33⅓ per cent.; beer labels 36c. a thousand; there is very little profit on labels, that would include the sketch of trade-mark; that would be nothing extra; Shakespearean cards, 60 M of each of the different kinds, $1,900, or $6.33 per thousand; ten thousand bird's-eye views at 13c. apiece, assuming that the sketches were made, or $2,800 for sketch and printing; ten thousand hangers at $14.45.

73 On cross-examination the witness testified:

Q. What is your age?

A. Next 4th of April I will be 56 years.

Q. How old were you when you came to the city?

A. 28 years old.

Q. And what business had you been brought up to before you came here?

A. Surveying; I attended a large estate also, or farm, as the- call it in Germany, superintending them.

Q. You were not brought up to be a practical engraver or lithographer, were you?

A. No, sir.

Q. You never learned that art, did you: I don't now call it a trade, an art; it is an art, isn't it?

A. I learned some of it.

Q. Did you learn how to lithograph or engrave?

A. Yes, sir.

Q. How much of it?

A. Well, when I was together with Mr. Beck I made about two dozen bird's-eye views with my own hands, and afterwards, too, picked it up; nobody showed it to me.

Q. But outside of that you have incidentally picked up around the shop in the way of outlining bird's-eye views of prospectuses; you have never followed the trade practically?

A. Not the lithographing trade; no.

Q. You have assisted at times in making sketches and prospective views?

A. Not assisted; I didn't need any assistance; I could do that myself.

Q. The special business to which you have given yourself to during the last ten years or more is that, isn't it?

A. Yes, sir.

Q. Sketching bird's-eye views and other views?

A. Yes; and other views; I can sketch most anything.

Q. In these bird's-eye views which you sketched you had for a number of years produced on stone and sold to the public, didn't you?

A. Yes, sir.

Q. And the views which you got up, were they in black or in colors?

A. They were in black and gray tints to it and sometimes in colors.

74 Q. How many colors did you have put on any bird's-eye view which you ever got up or designed?

A. Four.

Q. That is the highest number of colors?

A. Yes, sir.

Q. Do you mean four colors or four prints?

A. Four colors.

Q. That would not be much of a work in art in four colors?

A. It depends on how the colors are distributed.

I made one of Ludington, Michigan, in black, blue and buff, three prints; that was an edition of 2,000. I sold them for $2.00 a copy; that was the market price at which these bird's-eye views in three tints were sold. In larger quantities I would have much less. The largest quantity of bird's-eye views which I sold in my life in one lot was 5,000 of Sheboygan, Wis., in three tints. I must correct myself, I don't think I ever made any in more than three colors.

The bird's-eye view for Fisher is in 11 printings. I have never before seen any bird's-eye view in the United States contain as many plates and as many colors as the one of Salt Lake City. It contains a good many colors, it is a pretty fair piece of work; but it is nothing extra for the amount of colors. I think I have never made any bird's-eye views in more than three colors; I consider myself a judge of a piece of work like this.

I came here on Mr. Fisher's request at a compensation of eight dollars a day and expenses. I have no interest in the case; I have no animosity against the plaintiff if they would only go and do their business in an honest way. I was at one time the president of the Beck & Pauli Lithographing Co., for a half year. I wrote several letters to the Fisher Brewing Co., among which one of March 3, 1891—

No. 1.

MILWAUKEE, WIS., *March 3rd*, 1891.

Fisher Brewing Co., Salt Lake City, Utah.

GENTLEMEN: I was shown today a dispatch from your city in regard to one Mr. Cotzhausen, of the Beck & Pauli Lithographing Co.

here. The American Publishing Co., of which Mr. Cotzhausen is secretary and treasurer, and which position he also fills in the former company, is actually sailing one and the same flag.

Of the Beck & Pauli Lithographing Co. I have been president, but left because I was unable to befriend myself with the manner business was carried on, equally unable to promote honest dealings. The Beck & Pauli Lithographing Co. has a very bad name here now, and many prominent men have been victimized by the secretary, Mr. Cotzhausen. None, however, have found courage enough to expose thise crooked dealings, and all of us hail with pleasure the step your business men of Salt Lake City have taken in your own and in the interest of square and honest dealing. The Beck & Pauli Lithographing Co. is a stain on the respectable lithographic trade, and all honest men hope you may succeed to punish legally the Beck & Pauli Lithographic Co. Further inquiries cheerfully answered.

Respectfully yours, C. J. PAULI.

It is understood that yesterday Mr. Cotzhausen made a proposition to settle with the Fisher Brewing Co. for $18,000 and was met with a prompt refusal.

offering to expose the plaintiff's crooked dealings. This letter was published in the Salt Lake City papers. I have also written to other parties. I don't know anything else but what I wrote in that article or letter.

I don't know how much time was spent in sketching and designing the Salt Lake view, it may take two months; I would do it in two, perhaps less if the days were longer.

Q. You say you could get this up in two months, but the trouble is you never did do anything of that kind?

A. Oh, I can paint up a sketch and find a man to color it, if I couldn't do it myself.

No. 2.

I told Mr. Smith that I would expose the crooked dealings of the plaintiff, because I was approached every week myself by parties that had been victimized. They asked me if I knew something about it. My name was still connected with the Beck & Pauli Lith. Co., and that is the reason why people applied to me about the dealings of the company. I grew perfectly disgusted about it. I wrote to San Antonio parties about the lithographing there, for I had a certain reason to do that. Some of them enquired of me and wanted me to answer them. They enquired from me what I knew about the parties, the Beck & Pauli Lithographing Co. and the Am. Pub. Co.; you cannot tell them apart.

Q. How many men, please tell me are there in the West, between the lakes and the Pacific slope, who can properly design and get up a work of this kind?

75 A. I don't know how many; I don't think there are a great many outside of myself and Mr. Wellge, president of the plaintiff company.

In the publication of work of this kind there is a great risk to the lithographer, and he takes a great many chances on this work. My experience has frequently been that we spent weeks and months on a perspective view, and afterwards the men would not subscribe as much, as they led you to think in the beginning they would do; in some cases it happens that when they come to put down their names, they will not subscribe for enough copies to pay for getting up the work, and still less for the time spent in sketching it.

In the Fisher hanger there are twelve printings; as to the buck-beer cards, I didn't have time to examine; in the Shakespearean cards there are nine, as far as I can see.

For the last six years I have confined myself exclusively to bird's-eye views, and at times soliciting some orders for stationery for other houses; I am not connected with any lithograph shop at present. I think the customary commission paid by lithographers on orders of this kind is ten per cent. I have figured the cost of a thousand checks, like those for the Fisher Brewing Company, at $38; that would be the selling price; that is what it would cost to sketch, lithograph and get up this check book. The binding would cost $1, the numbering and perforating about 50c. each; I would not take the order for any less than $38.

GEORGE MARTIN, being sworn on the defense, testified, that he was foreman of Fisher's brewery in '90 and '91, and saw Mr. Cotzhausen there one Sunday afternoon, the latter part of March. Fisher came out and told me to go over and get some labels; when I came back C. was in the office writing.

About four or five weeks later I saw Smith at the brewery, Fisher was not in the office; Smith inquired for Fisher and said there was a paper here in the desk in the office, he would like to have it; I answered "You ought to come for such papers and get them when Mr. Fisher is here;" I would not let him have it; whereupon he said "It is all right, I can do some business up in the chamber of commerce with it, so I can show what I sold down here," and he showed me exactly where the paper was, and I opened the desk; I don't know the paper at all, he picked it up, took it and went off, and never brought it back. He said he was coming the next morning and would bring it back.

76 Being cross-examined, the witness further testified, it was about four or five weeks after the paper had been written, in the latter part of April or May; I didn't know anything about the paper at that time; I had seen him two days before with Mr. Fisher. I had a key to the desk; I kept stamps in there for revenue and had to open it once in a while. I have seen the paper, it was a kind of yellow common paper; I didn't look at it, I didn't see the inside of it, he just opened it, folded it up again, and put it into his pocket, and went off. I took him for a traveling man; he said he was going to bring it back the next day, and I took him for his

word. I never told Fisher that that paper had been taken away until the goods came, when he was looking for it; I thought the man would bring it back; I forgot all about it.

J. W. PETERS, being sworn as a witness on the defense, testified:

That he was 22 years old, and had been connected with the lithographing company in St. Louis and Salt Lake for four years. The Salt Lake price on stationery would be from $7.50 to $8.00 or a little over per 1,000. Labels, in lots of a million and a half, could be duplicated at 43c. The net cost of a thousand checks aside from the designing and engraving of trade-mark, would be $31.50; the paper would be worth about a dollar, the general engraving $5.00, transfers, $8.00, press-work $16.00, perforating 25c., numbering 25c. and binding $1.00.

TIMOTHY K. SAGE, being sworn as a witness on the defence, testified:

That he had some eight years' experience in the lithograph business, and was more familiar with commercial work than color work; that $7.15 would be a reasonable price for the different kinds of stationery in lots of 10,000; 7.82½ for the advertising cards per thousand; that in his opinion the 10,000 panoramic views could be furnished at $1,500 for the sketching and engraving and $1,500 for the balance of the work.

On cross-examination, the witness stated that he figured the bird's-eye view at 10 prints; but he did not know anything particular about bird's-eye views; that in his opinion a panoramic view like this would take a first-class artist about a month to design and the coloring would take about a month longer. That he knew of no one but Mr. Wellge, the president of the plaintiff company, who was in the habit of executing work of this kind in the West; that such artists are scarcer than engravers. That he did not recollect ever having seen any bird's-eye views in the United States executed in more than three or four prints, outside of this one.

77 F. K. GILLESPIE, sworn on the defense, testified:

That he was a member of the Real Estate Exchange of Salt Lake City, and that he met Mr. Cotzhausen, as well as Mr. Smith, prior to the 30th of March, 1890; that he bought some panoramic views from Mr. Smith, gave him an order in the spring of 1890 for one thousand at 75c. apiece; my recollection is that he said a less amount would cost more money, that 500 would be from 80c. to $1.00, some number was fixed as high as a dollar. There was a sample submitted; it was not colored, and he explained to me that it would be; the general appearance gave me an idea of what it would be, of the kind exactly, in fact, he went on to say that a great deal of the work could not be made in this country, would have to go to Germany; I think he used some artistic name, called it "Stamford," something of that kind.

I went with Smith and Colburn, and helped him solicit on this work; I believed it was something that we needed. I remember

him saying that he had secured the requisite amount for publication; he went on to enumerate to me, he named the Denver and Rio Grande, and different breweries, including Fisher's, which aggregated thirty or forty thousand.

JOHN R. RILEY, testified, that he was the freight agent of the Rio Grande and Western R. R. Company and remembered the arrival of the Fisher goods on the 14th day of February, 1891; they all came in one car, some 24 cases, weighing about 11 thousand pounds. The freight amounted to something between $360 and $370. There were other goods in the same car, I think for the California Brewing Company, $360 or $370 was the freight on the Fisher stock. We notified Fisher to come and get the goods within perhaps 48 hours after arrival; they remained at the depot some ten days, and were delivered on the 24th. Fisher received them in the ordinary course of business; I have no knowledge of any protest; I would have if I had any. Fisher had paid no freight charges except on his own consignment.

JOHN MONTGOMERY, JR., being duly sworn testified, that he was the secretary of the Real Estate Exchange during 1890, that the exchange was organized on the 4th day of March, 1890, that the exchange itself did not at any time give an order for bird's-eye or panoramic views.

78 W. F. COLTON, testified on the defense, that he was the cashier and assistant secretary of the Rio Grande and Western R. R. Company in 1890; that he was not aware of any order for the purchase of bird's-eye views from the American Publishing Company; that an order when given would not likely come to his knowledge, unless it came to him for payment; that he never ordered or bought any; that the purchase of matters of that kind was not within the duty of his office; neither did he know that Mr. Bennett, the general passenger agent, bought 500 of them, but that he had seen such views in his office.

Whereupon the defense rested.

A. E. COTZHAUSEN, being called in rebuttal, testified:

The Salt Lake views were sold in the market as high as $3.00 apiece; some orders were taken for $2.50. In large lots, outside of the Fisher and Wagener orders, the views sold all the way from $1.25 to 75c.—however, the latter price was under an arrangement to raise a subscription of 25,000 copies—a sort of pool. Some of the Real Estate Exchange joined Smith in canvassing for this to raise the amount. We had several negotiations with the Real Estate Exchange of Salt Lake City, to bring the matter before them.

I said nothing to Fisher regarding sales to the Real Estate Exchange at that time; he asked whom we expected to interest in this matter, and I told Fisher that we expected to put on the margin of these views some of the main sights of Salt Lake City and surroundings, such as the Union Pacific, Garfield beach, the Temple

and other places, and expected those people to be interested in it. We negotiated in regard to the different work and discussed it at length; we had the matter of buck cards under consideration the longest, because Fisher objected to the price of the buck cards most severely, and claimed that he had paid less the previous year; that matter was up for some time; I found Fisher to be very exacting, and after we had finally agreed on these buck cards, everything was satisfactory. I have already stated that the matter of labels was suggested by Fisher originally and that I was not willing to take that order under 75c. Fisher told me that he used more than a million and a half each year, he intended to push the bottle-beer trade and extend the exporting business. We finally agreed to make the labels at 55c. provided that we would have the privilege of renewing the delivery every year. Regarding the
79 buck cards, the price was finally overcome also, and I agreed to furnish them at 37½c. apiece, and insert the trade-mark throughout on the different advertising matter. The hangers were also discussed for some time, and it was agreed between us that they should be intended more especially for the bottle-beer trade, to be sent around throughout the country to the farmers; it was to be more of a family picture with children on, to be intended for the bottle-beer trade. The idea was to cater to the bottle-beer trade, and this hanger was to take that place.

The small advertising cards were also intended for the farmers; our conversation turned on these cards; Fisher said in substance that he wished to advertise to the bottle-beer export trade, and he wished to use advertising cards and hangers for that purpose, and these designs were to be made up, so as to meet that demand, and in accordance with those particular directions. I showed that class of work to Fisher, and he said he wanted some of that work to go into the family trade. It was dwelt upon at length that the family trade was to be catered for. We also had a long talk on the views; I told Fisher that we intended to insert on the margin of them some special views of Salt Lake City and surroundings, that we expected to get a large edition; that it depended upon our success whether or not we could publish them in the form we intended. Up to that time we didn't get any subscription to warrant the work, and I solicited Mr. Fisher's subscription, that was the main purpose at that time; he was the first one who started the subscription list, who actually subscribed. My recollection is that I told Mr. Fisher that such views retail at $3.00 apiece; in large quantities we expected to get about $1.25 for them, and I finally agreed to furnish him ten thousand at 97½c. apiece, which was agreed to, that is 97½c. in that large quantity. We talked on black stationery and colored stationery, and I told Fisher then that our colored stationery ranged all the way up to $14.75, but there was no price made at the time, because we had not decided on the trade-mark, and the number of colors to be used on the same; that was for future consideration when submitting sketches.

The price of stationery in the original agreement was left blank with a purpose; the trade-mark was to be embodied; up to that

time a trade-mark had not been agreed upon, it was not certain how many colors it would require—the number of colors and plates was not fixed; the price of the stationery depended on his future
80 decision as to trade-mark; it could not be fixed before the trade-mark had been settled upon and finally adopted for registration. It was agreed simply that the sketch should be submitted, nothing particularly was said about the price except that colored stationery would cost that much; we had not decided on the price of this lot, as we had not decided on the trade-mark.

When I solicited Fisher's orders, I told him that Mr. Wellge had been here and had made sketches for the bird's-eye view, that we expected another artist would come here and make the necessary changes. What I told him was true; I did not tell Fisher that we were making a number of views for the Rio Grande and Western, for U. P. and for the chamber of commerce, or for the Real Estate Exchange, and that it was something like fifty thousand we were making to be distributed all over the country; I told him I expected to get these different parties interested in the views, getting up a special edition, getting up a special margin with views on them; I probably would be able to get fifty thousand of them for general distribution. We then had reason to expect that to be the case; that statement was honestly and fairly made to him. I told him it was a work of art which we intended to get up, and that was true; that we would retail them at several dollars apiece, and finally I agreed to let him have ten thousand copies at 97½c. It is not correct as Mr. Fisher testified that he ever said to me, "I might take a hundred, if you will let me have them as cheap as they can be made for; don't talk of no 97½c. I wouldn't pay that for them"—nothing of the kind. Neither is it true as Fisher states that I pulled out a few sheets from my pocket, "Why I will make a memorandum of what you might need in the line of stationery." That is not the way it occurred or the conversation run; neither did I tell him that after submission of samples and proofs, if he wanted any, he could take them at any time as he wanted to; I never told him either before or after he signed the paper that he could order the things as he wanted them; nor did I ever represent that paper to him as a price-list or a memorandum merely, or anything of that kind.

I did tell Fisher that our firm made it a rule to have some written agreement between the parties before any work was done; before any sketches or designs were made, some written agreement would have to be sent to the house; it was an invariable rule of the firm, setting forth what the work would cost. What I stated
81 to him was absolutely true, because it was the custom of the house at the time to insist upon such a written proposition; that is the common and ordinary way in which not only ourselves but other agents made contracts for lithograph-work at or about that time: a written proposal on one side, and an acceptance on the other, that is the ordinary way we make our agreements. Fisher wanted a duplicate of the agreement, there was no copy book there, so I wrote out a duplicate as soon as I had my draft made. I wrote

out two copies, I made my original and then a copy of it, and then I handed them over to Fisher to sign. I know that the words "Read and all conditions agreed to" were inserted before the paper was signed, and it is not true as Fisher states that after we went out and had some beer, I inserted anything on the back or on the face of that paper; I did no more writing on the contract.

I never told Fisher that he might as well sign that paper, it was Sunday anyway, it didn't amount to anything because it was Sunday; I never told him anything of the kind; neither is it true that he merely glanced at the heading and end of it; I read the original draft to him, he sat right next to me and went over the various points very carefully, and talked in regard to the different work while we went along; I remember distinctly, when we came to the buck cards, another issue was taken on that; Fisher objected that last year's buck card had cost him considerably less, we quit on that question, and went on further. Fisher read it over carefully, to my recollection read it over once before he signed it afterwards. It took several hours to get up that paper, and talk over the various proposals it contained; we stopped several times while I was writing, and talked the various matters over as they came up; I could not tell how long it took to write out the original. I put nothing into that paper that Fisher did not read.

The first time I met Fisher was at Kansas City, at Heim's brewery. I had a lot of work there which I was doing for those people, and the matter of business advertising came up. I told Fisher that Wellge, our president, had been at Salt Lake City, and we intended to get up a large panoramic view of Salt Lake and surroundings; Fisher spoke to me about Salt Lake City and its boom at the time; we talked over advertising and lithograph-work, and I told him that I expected to go to Utah shortly, and I would like to have his patronage, get up such new work as he wanted; he answered that he would be glad to see me, as he would like to do some advertising, expected to go into the export bottle trade heavily, and into the family trade. I think this was four or six weeks before I came to Utah.

82 Q. Was there anything said about the nature of such writings, about such proposal and acceptances?

A. Yes, sir; I told Fisher the sketches would first have to be submitted and approved by him as satisfactory, before any of the work was finished; I explained this to him, he understood it that way.

I saw Mr. Fisher repeatedly after the time when this agreement was signed; we talked about the trade-mark, about making the fish on the style of a German carp, and finally agreed on getting up a trade-mark which would be suggestive of his name. In some of the sketches that were subsequently submitted to him, the letters "er" at the tail end of the fish are shown, but later on they were dropped; we first tried to make up his name in the trade-mark and use but one syllable; it didn't look well, it was dropped afterwards; we got instructions to drop it. I never was at Salt Lake to submit any sketches; I know nothing about that part of the case except what came to me through our agents and by letter. I think I came

here again towards the end of February or March; this was after all the goods had come here, and were at the brewery. Fisher then asked me for a copy of the contract; I pulled out the original, handed it to Williams, who made a copy of it. Fisher said he had lost his old copy of the contract, or some fellow came and got it; both Fisher and Williams read the original proposition at that time. Fisher then told me they hadn't figured it out, he didn't know it amounted to so much. I don't recollect anything that Williams said. Fisher didn't complain when I showed him the original that anything had been written in afterwards—nothing of the kind; neither did he accuse any one of putting more in the paper than was agreed on, nor that the paper was not fair or correct. This was the same time that Fisher tried to beat me down on the December bill some $600.00; there was some objection on the freight; Fisher complained a great deal that we had shipped those goods in a special car, something to that effect; that Smith told him there was a whole car-load coming through, the freight would be lower; he wanted me to stand part of it, and I finally consented to make some allowance, although I said there was nothing to my knowledge that we were responsible for. My recollection is that Williams grumbled as to some memorandum letter-heads, but I didn't engage in conversation with him. He said something about memorandum letter-heads being used, I don't remember what it was exactly; I did say I would make some concession, I wanted to be on friendly terms. Williams asked me to give a receipt in full. I re-
83 member they conferred together; I didn't hear what they said. When Williams made the proposition to give a receipt in full I would not do anything of the kind, and dropped the whole settlement business.

The day after that I went there once more. Fisher would not say anything, he simply refused to talk of it, so that settled it. This was after Pauli's letter was published in the newspapers.

I saw some goods distributed around Fisher's office.

Q. Now I ask you whether you at any time in your dealings with Fisher, personally or otherwise, intentionally or unintentionally, did anything to mislead him?

Question objected to, objection sustained, and exception taken by plaintiff.

The approvals on the various samples now in evidence first came to my knowledge when they were returned to our office, part of them by mail, others by express. I know of no changes or alterations that were ever made over Fisher's signature, either on the face or back of those proofs. The exhibits have always since been in our shop or office under my own supervision or control.

The prices charged in our agreement were not exorbitant; they were reasonable and standard with us on all these goods. Our company was engaged particularly in art publications. I have listened to Pauli's figures as to this class of work; his figures are entirely too low. He is not conversant with that class of work; I know pretty well he is not, he has only had experience in the cheaper

class of bird's-eye views. He was connected with the company while they worked such bird's-eye views particularly, some six years ago. Since that time this work has made enormous headway; in color-work there has been enormous progress.

Printing colored work, which Pauli puts at $3 a thousand, was figured in 1891 at $6 cost. That is a fair criterion, the customary charge. I have here present proof of the various plates that go to make up the Salt Lake view, which I now exhibit to give the court and jury an idea what the execution of such work involves. These are consecutive impressions; each one of these plates involves the lithographing of a certain stone. The compliment card and trade-mark are extra (silver, blue and black).

I am not aware that in point of size or character of execu-
84 tion a view like the one now before the court, has ever been produced in the United States. It took almost a year to finish this one. I recollect that Mr. Wellge was here several months in the West sketching. I don't know how long he was at Salt Lake or how long it took to sketch this bird's-eye view. Took us several months to complete the sketches and oil paintings. When selling these perspective views at $3 in retail, and $1.25 in larger lots, and 97c. to Fisher, it didn't yield anything more than a living profit, without taking into consideration losses and lawsuits. Pauli's method of figuring profits—adding a certain percentage to the cost of executing the work, is absolutely incorrect.

His profits are merely imaginary. There are a great many other expenses to be deducted and emergencies to be met. On work of this kind the pay of our artists ranges all the way from $30 to $125 a week, at eight hours a day. Good colorers get from $25 to $50 a week; good tran-fer-ers about the same. The commission of solicitors is generally fixed at 10 per cent. on the gross amount. Labels like these could not be manufactured so as to yield a living profit at from 30c. or 36c. a thousand. There is very little profit on labels anyway; neither could the advertising cards be produced at $6.33 per M. We could not "reproduce" the sketch and oil painting of the bird's-eye view at 13c. apiece, as Pauli states, still less originate them—decidedly not, nor at 28c. We could not even do the printing and furnish the paper at that figure.

The same is true as to Pauli's estimate on the hangers; our customary charge is 33⅓c.; to my knowledge other houses charge about the same; $14.45 or anything approximately would not be a reasonable or customary price for such a hanger. The price of printing as sworn to by him, is just half—the same is true as to the sketching.

I told Fisher in Kansas City that we had made a sketch of Salt Lake; Mr. Wellge had been there, and we intended to publish a large panoramic view, something very fine, but I did not go into details.

CHARLES J. SMITH, being recalled on behalf of the plaintiff, testified:

I sold some three hundred copies to the Rio Grande R. R. and one

thousand copies to the Union Pacific at $1.25 apiece. Also one thousand to Bacon's bank at $750; one hundred to Mr. Auerbach at $250; one thousand to Judge Colburn, also to Kelsey & Gillespie; I don't bear the parties all in mind.

85 For the last five months I have been in the employ of the Milwaukee Lith. and Engraving Company; I am familiar with the customary prices of work as involved in this case; I am as familiar as any agent on the road. It is not true as Pauli represents that the value of this kind of work was greatly exaggerated; the prices charged in the original proposition compare very favorably with fine-class work.

I have heard of Pauli for a good while; I understand he has been in the habit of making little pictures in black colors; I never heard of him doing anything but one-color work; I should not consider him by his work to be an artist; I never heard that he was a practical lithographer; his figures are not correct.

When I called on Fisher in April, with a number of sketches, which he approved, Fisher got out his copy of the agreement, and passed it to me; I read it over with him, he resorted to it before he O K'd the papers. The copy was exactly like the original proposition offered in evidence, word for word, on the same kind of paper; the words, "All terms and conditions included in the above read and agreed" were in the duplicate copy, same as in the original; there can be no mistake about that, they were absolutely alike in all respects; I believe that the words "Signed in duplicate" were written on the top of the copy, I am not sure, I don't think it was at the bottom; it was "Signed in duplicate," I remember that distinctly, I have no doubt that the two papers are alike. I don't know that I saw Williams around at that time, I didn't know such a gentleman as Mr. Williams at that time; I never saw him to my knowledge. Fisher didn't say anything about the terms or the nature of the conditions of this paper at that time; he made no kind of protest that it was not just what he thought it ought to be, or what he expected, or anything of that kind; he never offered any objections whatever. He said a good many things in regard to it, we had a long conversation. I showed him the sketches and he says "Wait a minute, I have got a copy of this around here," and he got it out and looked at it; he looked it over, and asked me what the sample was in the agreement, and I told him; he asked if certain things were going to cost that price; I told him "Yes." He referred to the prices several times and the quantities, and he approved them in accordance with the agreement.

86 He, Fisher, signed his name to the various sketches, after the letters O K were written on there; there can be no question on that.

I sent the samples and sketches after they were O K'd to Milwaukee; they have never been back in my possession. Neither Fisher nor Williams ever gave me an order for a check book or anything else.

The next sketches were submitted towards the end of October; it is not true that the words over Fisher's name on the back of the

proofs, which I then submitted, were written in afterwards. That was all written in before signing. When the bird's-eye view was submitted in December, Williams was present; we had a conversation about the contract and the work to be done before Fisher came in. Williams said, "You are the publishing company, are you, the lithographing house of Milwaukee?" I said, "I represent them;" he says, "You have got a hell of a contract here with Fisher, haven't you?" I said, "I don't know, I had nothing to do with it, it was made by our treasurer;" and he said, "You have got more stuff here—than we could use in a hundred years;" and then he referred to one of our hangers, which was made for the Paine Company, at Denver; he said, "That is some of your work, is it?" I answered, "That is made by the Beck & Pauli Lithographing Company, I also represent them." He said, "When are you going to get those advertising cards out?" I told him they would be delivered with the balance of the work, I supposed; he then referred to some stationery which they were in a hurry for; I don't recollect the details of that but our conversation was cut short. I went out to look for Fisher; I told him I had some things to submit in connection with his contract; I went over to the brewery with him; I unrolled my proofs of the bird's eye view. Mr. Williams came and looked them over with us; thought it was a very fine job; he asked Fisher whether he was getting a thousand of them; Fisher says, "How many are there of these?" I said, "Well, the contract calls for ten thousand of them." Williams commenced to make some objections about it, but Fisher took me into a little room and said "Come in here, you and I will attend to this." We went into the little room; he offered some suggestions which I put in, two more little bridges across the Jordan river. I believe he also put down the words "Jordan place," on that property there, and he said it was satisfactory, and he took it in accordance with the agreement; so I wrote this approval on here. When I got up after writing, he says, "What about this Real Estate Exchange will they endorse it?" I said I thought they would;
87 I had talked with most of them. He said, "Well, if these are not accepted here by the people, or are not endorsed by the exchange, I don't want to take these things; they are better judges than I am." Then I said I will take the responsibility on myself: I would leave it optional with him, because I was sure it would be accepted, and I put on the words, "Provided the Real Estate Exchange accepts map," and after I had written that Fisher signed it with the same pen which I have got right here with me (witness produces pen); it was a fountain pen. It is absolutely false that this proviso as to the Real Estate Exchange was ever written on in pencil on the back of the sample; it was written on the front; we did not write on one side and have him sign on the other. It never occurred to me to look for any writing in pencil on the back of the sample proof until Mr. Rawlins and others looked at the same; I might have written something on the back in lead pencil. We often talk about a point and stick a pin through the map where we want to make a correction on the colored side—refer

to it by the pin-hole on the back; sometimes where a change is wanted, something like that; I don't know that I do it often, I think not; I examined this proof-sheet and could not find a trace of anything ever being written on the back. The only time that this proviso was written, was in ink on the face of the proof, before he signed it; there can be no question about that, not a bit, no, sir.

I never went to the brewery and got Fisher's copy of that agreement, as Martin testified. It was not his copy, it was a subscription list on which I had a number of names; I had left it down there with some other papers, on Fisher's desk, the day before. I asked some man there for Mr. Fisher, and explained I had left some papers there; he inquired where I left them; I told him on Fisher's desk; they lay right there back in the corner; I said, "These are the ones;" he said, "All right, you had better see Mr. Fisher about it." I mentioned it to him, I guess, I have forgotten, that they belonged to me. I never by mistake or otherwise took his copy of the contract; the only time I saw it was when he showed it to me in April; I didn't want his contract. The paper which I got was this subscription paper, which Judge Colburn wrote up for me, bound in one of those yellow covers; I had some subscriptions on it.

The words "as per agreement," etc., of March 28th, were endorsed on the back of the samples in October, because we talked it over; they were in accordance with the agreement if they suited him; he said he wanted them delivered in accordance with that agreement. They were always dunning us, anxious for the work; we wrote it down "per agreement."

88 On cross-examination Mr. Smith testified:

Q. Mr. Smith, you know where the ordinary and usual place to sign a public document or contract?

A. Why, I think so; it would depend a great deal.

Q. Where is the place of putting a signature?

A. Well, do you mean in a contract like this?

Q. Any contract.

A. I think that I would make——

Q. (Interrupting.) No; in an agreement of any kind where is the place to sign it?

A. In a proposition written in that way you address it in the form of a letter and sign it when you get through the letter.

Q. Ordinary agreement by one person, which is signed by one person, where is the ordinary place to sign it?

A. Well, sometimes I might sign the side of it; sometimes the end of it.

Q. Is the ordinary and usual place underneath and to the right hand?

A. Not necessarily, I don't think.

Q. Not necessarily; but is that the ordinary and usual place?

A. No, sir.

Q. Where is the usual place?

A. I couldn't tell you. It never occurred to me. I never had occasion to think.

Q. Is the place to sign it in the middle or on the left-hand side?

A. Well, it would depend where you end that agreement. If this agreement is written out——

Q. (Interrupting.) Suppose the agreement was written and you wanted a man to sign it—assuming that that is an agreement which you wanted a gentleman to sign, you told him to sign it here or there or there, the left-hand side or the middle or on the right-hand side?

A. If I had made an agreement?

Q. If you had written it out and wanted a gentleman to sign it where would you ask him to sign?

A. I would probably ask him to sign it about there, after the word approved here. I would write over here Yours truly. I would put his name here.

Q. A promissory note, that is the ordinary and usual place of signature?

A. I have never given one.

Q. You have seen them?

A. Yes.

Q. In the course of your business?

A. Yes, sir.

Q. Is that the ordinary place, to the right and below?

A. There is generally a blank line put on there.

Q. Is that the ordinary place to sign a document?

A. Well, I can't say. I don't want to say, because I don't know.

Q. You don't know where the usual place is?

A. I get my name on it.

Q. You will get what you want on the paper, you mean. You wrote out this agreement on the face of the bird's-eye view of Salt Lake City?

A. I wrote out the approval.

Q. With the pen and ink which you carried in your pocket?

A. Yes, sir.

Q. You say you wrote it out before Fisher signed it?

A. Yes, sir.

Q. Then you asked Fisher to sign it, did you?

A. Yes, I asked him to sign it.

Q. You told him where to sign it?

A. No, sir; he seemed to know pretty well.

Q. Do you think he knows where to sign it?

A. Yes, sir.

89 Q. A general thing a man signing an agreement knows where to sign it; there is the agreement which you say was written down there. Now, there is plenty of room right beneath that and on the right hand to write "A. Fisher Brewing Co.," isn't there?

A. He could have got it over there just as well; I don't see any reason why he couldn't.

Q. No difficulty in getting it there; any ordinary man signing an agreement, a business man signing it, would sign it there, wouldn't he?

A. I don't think he would in an approval, O K a sketch.

Q. Fisher got away over here to the left and crowded down on these other letters, and there was much more room over there to the right, the ordinary place, to put his signature?

A. Why, I don't — why he put it there; he positively signed it there after I wrote it out without pointing my finger to the place.

Q. Can you explain why it was, that Fisher's signature being written there, that his writing is curved over?

A. I didn't notice that it is.

Q. In that manner?

A. It is not.

Q. You had a pencil there, did you not?

A. I must have.

Q. Did you have a pencil?

A. I don't remember.

Q. Don't you remember whether you did or not?

A. I don't; I don't recollect whether I had a pencil or not.

Q. Did you do any writing on the paper with a pencil?

A. Yes, I guess I did.

Q. Did you have a pencil?

A. Yes; I know I did now. I remember the instructions on the top about putting in one bridge, one thing and another.

Q. Did you write that 3-28-'90?

A. Yes, that is my writing; that is the date of the agreement.

Q. When did you put it on there?

A. Oh, I might have done it at the hotel before I went down.

Q. Did you put it on there after or before?

A. I did that before; sort of reminder of what the date was.

Q. You put it up there in pencil before, or did you put it up there then?

90 A. I am pretty sure I put it up there then, sort of reminder; very easy, you know, to forget the date of a contract. I had a good many other things to attend to.

Q. You had forgotten this date of the 28th, 1890?

A. No, sir.

Q. That didn't ring in your head?

A. No.

Q. You didn't have occasion to read it before?

A. Yes.

Q. When did you read it before?

A. A day, I think, before.

Q. Do you remember writing that word 3-28-'90 before?

A. I wrote a good many letters that day; I don't know, I may have wrote it.

Q. It wasn't the date that you remember at all?

A. I don't know; I have always did that a good many times.

Q. You didn't have a copy of the agreement in your pocket, then?

A. When I was out to the brewery I don't think I had; no, sir.

Q. Or when you had these views along, you didn't have a copy of it?

A. When do you mean—when I first went there?

Q. No; when you first presented that day?

A. No, I don't think I did that day. I didn't think it was necessary to take it down.

Q. Did you put on Jordan place at that time?

A. Yes, that was on there. That was done when I was there before—I don't recollect whether it was on there, he made some suggestions about some bridges and one thing and another.

Q. Did you put Jordan place on that agreement at the time Fisher signed this map?

A. Marked it up?

Q. Yes, sir.

A. I don't remember whether I did or not. I don't know whether that is on there now.

Q. Wherever you did any writing on that occasion, unless you say it was when you put this writing on, you did it with pencil?

A. I always make suggestions on the——

Q. (Interrupting.) That is in pencil, is it?

A. Yes.

Q. And other marks that are here with pencil?

A. I always make corrections with pencil. Instructions, approvals, I would rather have it in ink if it is handy.

Q. Did you have the original with you when you first saw Fisher down at the brewery—this 3-28-'90?

A. Yes, sir; the original contract.

Q. What?

91 A. The original paper, yes, sir.

Q. With you?

A. Yes, sir.

Q. You had brought it from Milwaukee?

A. I had brought it from Milwaukee, yes, sir.

Q. You had it in your pocket?

A. I had it right with me, yes, sir.

Q. Why did you ask Fisher for the copy?

A. I didn't ask him.

Q. Unsolicited he got it out and handed it to you?

A. Got it out very quick; yes, sir.

Q. And after reading it very carefully, the copy Fisher got out, you noticed that exactly corresponded with the original?

A. I read it over and saw every word was in there just like the original. I had the original there to refresh my memory with—the different items; prepared myself, of course.

Q. You wanted to see that actually corresponded?

A. Well, I didn't go for that reason at all; I didn't get it out, in fact.

Q. I thought you said you did?

A. Excuse me, no, sir.

Q. You saw it?

A. I said that I read it over, his agreement, and that he approved the sketches in accordance with that agreement. I know from reading it over it was *the* like the copy I had previous to that which I had in my pocket; if he could not have found his I would have

produced mine. I had it in my pocket; it wasn't at home. I had it with me.

Q. You didn't produce the copy which you had?

A. No, sir; I didn't show it that day.

Q. You were careful to know how the Fisher copy corresponded with that?

A. Yes, sir; I know it was the same; I know it was in fact signed the same.

Q. You noticed that?

A. Yes, sir.

Q. You particularly noticed that?

A. Yes, sir.

Q. Then you forgot some papers there and went back the next day and got the paper from Mr. Martin?

A. About two weeks after that—about two weeks. I called on Mr. Fisher a good many times; we were very good friends
92 at that time. I saw a good deal of him. I had been up to the brewery there. I had, I think, the paper with me at that time.

Q. Didn't you testify in your former examination in this case that you were not there from October?

A. No, I think not; I couldn't have testified to that.

Q. Didn't you testify in answer to my question whether you went back with that paper, that you didn't go back there at all?

A. No, sir; I didn't say that. I might have said I didn't go back there on that occasion, something like that.

Q. Didn't you say you didn't go back there at all?

A. I don't recollect saying that.

Q. Didn't you testify in your former examination when I asked you if you didn't return and get that paper, that you didn't go back there at all, and you wasn't back there until October?

A. If I answered that way, I answered I didn't get that paper.

Q. You made a mistake?

A. No, I didn't say so, because I called a good many times myself.

Q. Wait a minute. Why do you think it necessary to change your testimony?

A. Oh, no, I don't; I haven't changed.

Q. Williams said to you, before you met Fisher, in December, "Why, you have got a hell of a contract here with Fisher, he has enough stuff to last him twenty-five years"?

A. One hundred years; he didn't mean that.

Q. He didn't mean the stuff that was there?

A. Why, no; there was nothing there but the proofs.

Q. Mr. Williams, as I understand you, was not running the business?

A. He thought he was doing a good deal of it.

Q. You think so?

A. Well, he has never made any objection.

Q. I thought he was talking about how much they were taking?

A. When I was there at that time, one thing he said was about hurrying up some advertising cards.

Q. Fisher didn't say that he thought 100—he would take about 200 to go around, and Williams suggested 250?

A. There was no such number mentioned.

Q. Why was it billed as 250?

A. I have no idea.

93 Q. Mr. Pauli doesn't know what he is talking about; that is what you said?

A. I think he doesn't.

Q. What experience have you had in the lithographing business?

A. Why, I have been selling goods on the road for about six years in every State in the Union—all kinds of lithographing-work, for the Beck & Pauli and the American Publishing Company and for the Milwaukee Lithographing and Engraving Company.

Q. Are you a lithographer?

A. Oh, no; I am a travelling man.

Q. Are you an engraver?

A. Not a bit.

Q. Are you a designer?

A. No, sir; I do design a little in my own way.

Q. Are you a sketcher?

A. I do sketching, some; yes.

Q. Are you an artist?

A. Oh, I wouldn't say in particular I am. I am an amateur one.

Q. You expect to develop into a star?

A. I don't care to very much; not in that profession.

Q. You spoke of the Beck & Pauli Lithograph Company and the American Publishing Company as our concern, does that firm belong to you?

A. Well, no; it is a custom for travelling men to refer to the firm as their firm. I don't say the firm I work for.

Q. You are not now with this firm?

A. No, I haven't been with them for four months. I have been fired from that firm; I am not on particular good terms with them; no, we have some differences.

Q. Mr. Pauli was formerly president of the Beck & Pauli Lithographing Company, wasn't he?

A. Yes, I believe he was.

Q. After being disengaged with it, the Beck & Pauli continued to use his name in spite of his protests?

A. I believed they changed it.

Q. You represent indiscriminately the American Publishing Company and the Beck & Pauli Lithographing Company?

A. I think they were about——

Q. You sometimes took an order for one and sometimes for the other?

A. Generally when I took a lithographing order I made it Beck & Pauli, when I sold maps, most of my time I was for the publishing company.

Q. You were connected with both?

A. I was getting 10 per cent. for everything I sold for them.

94 Q. Do you always carry that pen with you?

A. I leave it sometimes.

Q. You had in your possession in 1891, and still have it?

A. I have had it about three years.

Q. Mr. Cotzhausen carries the same kind of pen, doesn't he?

A. I don't remember ever seeing him with one, he may have it; it is customary for travelling men to carry pen and ink.

Q. You had this original contract in your pocket here a week or month or so after this March 28th, what other interlineations were there in the contract aside from those, all terms and conditions included in the above read and agreed?

A. What other words in it, do you mean?

Q. Yes, interlined in it.

A. I don't remember it at all; in the original you speak of?

Q. Yes, in the original?

A. Well, I don't recollect; I don't remember just how the thing was written out.

Q. Was there any other interlineations put in it?

A. Not that I recollect of; I don't remember one way or the other.

Q. Didn't notice particularly as to whether the interlin-ation, "All terms read and agreed," was in Fisher's copy?

A. It was the first thing I pointed to, like it had been stuck at the bottom, that caught my eye.

Q. That was the first thing you looked at?

A. It isn't very seldom a man signed both duplicate and original contract. It had all been signed.

Q. Now, did you look in the Fisher copy to see if it contained any other interlineation than in the original?

A. No, I didn't; it never occurred to me.

Q. Were the words in the original, "Fisher Brewing Co., Salt Lake City," at the top?

A. Well, I don't remember that; I think it was addressed to them; I don't recollect.

Q. Were those words also on the second page of the original?

A. They were duplicate copies.

Q. In the second page of the Fisher copy was there on it "The Fisher Brewing Co."?

A. Well, I don't recollect that. I don't remember that. It is immaterial, though.

Q. When did you present the sketch of the bird's-eye view or the proof to Mr. Wagener?

Objected to. Overruled.

A. Well, I don't remember; I think it was along the same
95 time I presented the sketch to Mr. Fisher of the bird's-eye view in December, presented it to him out at the brewery.

Q. When you presented it to him did you say to him that Fisher had ordered 250 of the views?

A. I didn't; no, sir.

Q. Or in substance that?
A. No, sir; nothing like it at all; I told him——
The COURT: That is all.

J. R. KUSHBERT recalled in behalf of the plaintiff:

When I first went into Fisher's office and introduced myself, showing him these proofs, he said, "Wait a minute, I will look for my agreement," he looked through his desk, through his safe, went away and came back, said he could not find it; so I produced a copy of the agreement and showed it to him; he and Williams both read this copy, and after reading it, Fisher turned to me and said, "I don't know whether that is just like mine, we want you to put on here, 'Accepted as per agreement of March 28th,'" so I wrote that on the back of each of the proofs, and he signed his name under it; that was all about. I had met neither Williams nor Fisher before that time. After they read the copy, they saw that there was no price on stationery; so they asked me what that would be, I told him the customary price was $14.75; here Williams remarked that they ought to have a check book, and Fisher asked me what the check book would cost. I inquired whether he wanted the trade-mark on it, he said, "Yes;" then I told him it would cost between $35 and $40; so he turned around and said, "You have got to make that check book at the same price you make the rest of the stationery;" I didn't want to do that, but finally I said I would interview the house about it, probably they would do it, and it was so done; the matter was left in that shape.

The customary price for colored work, for the printing is $6.00 a day. Pauli's estimate of cost does not come up to customary figures by 50 per cent., in some cases over that; he figures 50 per cent. lower on some things than what the work can be produced for.

Cross-examination of J. A. KUSHBERT:

Q. How old are you?
A. I am 24 years old.
Q. What is your business?
A. Real estate at present.
Q. How long have you been engaged in real estate?
A. Two years.
Q. Before that how employed?
A. I was employed by the Beck & Pauli Lithographing Company and the American Publishing Company somewhere about five years.
96 Q. What were you doing?
A. I acted as book-keeper, collector and salesman; that is about all.
Q. Did nothing but collect most of the time, did you?
A. In Milwaukee I collected. I collected some on the road when I run across anybody that owed us any money.
Q. You are not an engraver?
A. No, sir.

Q. Nor artist?
A. No, sir.
Q. Sketcher?
A. No, sir.
Q. You know nothing about that?
A. I can't sit down and do it, but I know how it is done; I know pretty near what it costs to do it.

At this stage of the proceedings plaintiff's counsel moved the court for leave to conform the complaint to the facts proven, so as to cover the check book and inserting an allegation to the effect that the stationery was reasonably worth $14.75 per thousand, which amount the defendants agreed to pay therefor.

Objected to. Objection sustained; to which ruling the plaintiff duly excepted.

The foregoing was all the evidence adduced by either party on the trial of said cause; the exhibits omitted from this bill of exceptions are by stipulation made a part hereof the same as if incorporated and attached hereto, which said stipulation is hereto annexed.

(Title.)

It is hereby stipulated between counsel that the exhibits referred to in the bill of exceptions herein, and introduced in evidence upon the trial of this cause, have been made part of, and are treated as incorporated into the bill of exceptions herein, and that the same need not be attached to said bill of exceptions in the third district court, nor any other court to which this cause may be taken on appeal by either party, unless the same are required to be so incorporated by a rule of court.

It is further stipulated that either party having control of such exhibits shall and will produce the same in court upon any further hearing of this cause, either upon motion for new trial or upon appeal.

97 That the reason for entering into this stipulation is to obviate the necessity of filing with the clerk and making a part of the files of this cause said exhibits, which are unwieldly and cumbersome.

Dated May 5th, 1893.

DEY & STREET,
Attorneys for Plaintiff.
RAWLINS & CRITCHLOW,
Attorneys for Defendants.

Both parties having rested, the plaintiff submitted to the court in writing the following instructions and prayed that the same be given to the jury, to wit:

Plaintiff's Instructions.

I.

The defendants set up in avoidance of liability that the written instrument under date of March 28, 1890, was reduced to writing and signed March 30th, this being Sunday. Mr. Fisher assigns no reason why the paper was made to bear a different date. Whether it was in point of fact made and concluded on Sunday is a question of fact, which ordinarily the jury would have to determine from the preponderance of the evidence. The paper is presumed to be executed when it bears date, and evidence to the contrary must be clear and satisfactory—otherwise the time of execution must stand as written.

Refused. Exception by plaintiff.

II.

However, in view of certain undisputed facts, the question whether the paper was actually executed on Sunday becomes immaterial. The defendants admit that they approved or intended to approve by their endorsement and signature all and singular the various sketches, designs, proofs, etc., submitted to them in the course of the year from time to time, excepting only certain small changes which were directed to be made in part of the work. By their letter of September 13th, after receipt of advance shipment, they also indicate that "the work so far is quite satisfactory," and they urge the speedy execution of the balance. This letter is followed by another under date of January 24th, after receipt of a second shipment, and after receipt of an invoice showing prices of the goods shipped, wherein they insist that they should not be called to accept
98 any drafts, until the whole order was completed, and promising to remit at once, upon arrival of the goods and finding the same to be as ordered.

Now, conceding the original contract or agreement to be void because in contravention of the statute, still by these subsequent acts and writings, and the instructions to modify the work, the defendants will be deemed to have reaffirmed the original order or contract, and they are now estopped from asserting the invalidity thereof on the ground of public policy.

Refused. Exception by plaintiff.

III.

The defendants also complain of certain interlineations or alterations in the written instrument dated March 28, 1890. The evidence of the defendants on this point is by no means clear and free from ambiguity. Whatever alterations or interlineations may appear to have — made, *it must be shown that they were made subsequent to the execution or signing of the paper, and without the knowledge and consent of the defendants;* otherwise such alterations

or interlineations will not affect either the validity or construction of the paper itself. Yea, it does not even appear that the duplicate or copy which the defendants kept for their own use and future reference, was different from this first draft, which is now offered in evidence. On the part of the plaintiff it is insisted that the two papers were precisely alike, except that Fisher's copy was a cleaner writing; the defendant Fisher claims to have no knowledge on the subject.

Refused. Exception by plaintiff.

From the evidence of Fisher himself it appears that he displayed an almost reckless disregard of all business habits which ought to prevail in dealings of this kind between parties, otherwise on an equal footing. Mr. Fisher is shown by the evidence to be neither blind, illiterate or inexperienced in business matters. He informs us that he merely "glanced the paper over before signing it;" he admits to have taken a copy, a duplicate, for purposes of future reference, which he placed in his desk, whence it was taken out about a month later and read over on the occasion of the first submission of sketches and designs by Mr. Smith. No objection to its terms or language appears to have been made by him on either occasion; even later on, in his letter of February 26, 1891—after arrival of all the work at Salt Lake City—he refers to this agreement of March 28th, and the orders then given, and while complaining of exorbitant prices and large quantities, he nowhere
99 intimates (even at this late date) that he did not know the wording or language of the agreement thus by him signed. Upon these undisputed facts the court instructs you that if Fisher really did neglect to read the paper which he signed, and thus remained ignorant of its terms, he cannot now complain, because he would appear, by his own admissions, to be a victim of his own folly.

Refused. Exception by plaintiff.

V.

The written instrument of March 28th will be held as controlling the plaintiff's right to recovery, and be conclusive as to the quantities ordered and prices agreed upon, unless invalidated by fraud or misrepresentation. The court is not prepared to say as a matter of law that it is unfair or inequitable upon its face, nor that the quantities ordered and prices fixed are exorbitant and excessive. Parties, otherwise competent to contract, must be left by the courts to the legitimate consequences and results of their contracts, and they will not be permitted to complain unless defrauded in the execution of the same.

Refused.

VI.

The defendants have utterly failed in proving their allegations set up by way of amendment of their answer; they have not laid by their evidence any foundation in law for holding this written

instrument to be void or voidable on the ground of misrepresentation regarding the value of the work proposed to be furnished.

Refused. Exception by plaintiff.

VII.

The defendants cannot be permitted to deny the legal effect of the written instrument which they signed and the defense of fraud cannot be maintained by evidence which merely tends to show that it was represented or agreed at the time the paper would only subserve the purposes of a price-list, memorandum or the like, from which the defendants might make their selection and give future orders at their pleasure.

Refused. Exception by plaintiff.

VIII.

One of the most ordinary methods of concluding a contract is by making a written proposal on the one side, accepted by the other. That is, if one makes to another an offer, verbal or written *direct*, of a sort implying nothing to be done except to assent or decline, and the latter accepts it, adding no qualification, there is thus constituted a mutual consent to the same thing at the same time; in other words, a contract. And the question of the sufficiency of the transaction to work this result is of law for the court.

The United States court of appeals in a late case has decided that a written proposal, substantially like the one here in evidence, when bearing words "approved" and the signature of the defendant, constitutes a valid and subsisting contract, which—when followed up by substantial approval of the designs, sketches, plates, etc.—authorize the lithographer, without any further orders or instructions whatsoever, to execute the work, and to collect on delivery their pay therefor. This court instructs you on the evidence and writings in this case to the same effect.

Refused. Exception by plaintiff.

IX.

The defendants admit in their answer that after approval of sketches, they did order a certain limited quantity of stationery and other articles *at prices* to be paid by them, *as agreed upon the time the order was made;* and that it was then and there agreed that defendants would accept and pay for—

1½ million labels at 55 cts. per 1,000.

250 views of Salt Lake City at 80 cts. each.

300 bock-beer cards at 37½ cts. each.

1 check book containing 1,000 checks at $14.75.

5,000 advertising cards at —.

They aver that these were the only articles they ordered or brought; but it appears from their own evidence that Mr. Williams, upon instructions received from Mr. Fisher, gave an order for additional stationery, viz:

10,000 letter-heads.
10,000 note-heads.
10,000 statements.
10,000 bill-heads.
10,000 business cards,

as early as April, 1890, (answer to direct interrogatory 6.) The contract price of the labels is admitted to be 55 cents; bock-beer cards 37½ cents (Williams' answer to int. No. 7); advertising cards —; 1,000 checks $14.75.

As to the other stationery it is now insisted by Fisher that
101 no price was fixed, and that the prices as charged were exorbitant. It will, however, be borne in mind, that in his answer he distinctly alleges, the prices to be paid were agreed upon at the time the order was made, and also, that to the price of $14.75 for a thousand checks, involving substantially the same kind of work, no objection appears to have been made. The jury will also consider in this connection that when the advance shipment of December 15th was made, the price of stationery was stated in invoice or letter of advice throughout at $14.75, and that to this charge no objection was made for a long while—on the contrary the defendants write under date of January 24th: "Whenever you see fit to complete our order, ship and invoice properly; upon arrival of goods and same found to be as ordered, we shall be pleased to remit you at once."

In the absence of clear explanatory evidence, these various facts ought to conclude the defendants from now assuming another or different position; they tend to show that the price of that stationery is not now left open to conjecture, but is alike with that fixed for that check book.

Refused. Exception by plaintiff.

X.

In view of the fact that Mr. Williams concedes an order for 10,000 each of five different kinds of stationery—in fact for all that the original proposal covers, except the small letter-heads and envelopes, it does not now lie in the mouth of the defendants or their counsel to complain of the exorbitant quantities, lasting them for twenty-five years or more, the order thus given entirely disposes of all controversy on this point.

Refused. Exception by plaintiff.

XI.

Even if it be true that the original proposal or agreement were not binding upon the defendants, on ground of public policy, misrepresentation or subsequent alteration, still the plaintiff would be entitled to recover for the work and articles actually delivered, because the defendants are shown by their endorsements of July, October and December, which appear on the back of the final proofs, to have affirmed and reiterated the original agreement, and to have

given further directions as to the execution and delivery of the work.

Refused. Exception by plaintiff.

102 XII.

It is only by the clearest and most satisfactory proof of forgery that the legal effect of these several written endorsements on the proofs of plate can be destroyed. Mr. Fisher tells us in his answer that his signature was simply "an act of courtesy and good will;" that the words over his signature in all these instances were afterwards written in without his knowledge or consent. In this, his statement, he stands altogether alone, and is not corroborated by any other evidence in the case; but he is opposed by several witnesses on the part of the plaintiff, who testify that the words were written out before Mr. Fisher signed.

The jury will have to determine this question from the testimony before you in connection with the writings themselves. Mr. Fisher's version cannot be accepted as true, unless you convict the other witnesses of having perpetrated a great wrong.

Refused.

XIII.

If you find for the plaintiff on the original agreement of March 28th, then it is entitled to recover on account of work actually done and delivered as follows:

For views of Salt Lake City	$9,700 00
For hangers	3,750 00
For bock-beer cards	112 50
For advertising cards	2,925 00
Money advanced on registration of trade-mark	25 00

Seven kinds of other stationery, 70,000—such amount as you may find, it has been agreed upon, or as you may find the same to be reasonably worth at the time.

Add to the aggregate of these interest at eight (8) per cent. from April 1st, 1891, according to the prayer of the complaint.

Refused.

XIV.

If the plaintiff recovers on the ground of the original agreement of March 28th, it is also entitled to recover the actual profit that it would have made, had the contract been fully performed by
103 duplicating the first shipment of bottle labels for five consecutive years thereafter. The amount thus claimed and proven is $2,460.

XV.

In regard to the charge of fraud or misrepresentation the burden of proof rests upon the defendants. They must prove the fraud or misrepresentation substantially as set up in their answer by clear

and satisfactory evidence, such as will preponderate over presumption and the evidence by the other side.

XVI.

In every case where a charge of fraud, subsequent alteration, forgery, or the like is made as here a presumption of honesty must be overcome, and stronger evidence will accordingly be required than would be necessary in a case in which no presumption existed.

Refused. Exception by plaintiff.

XVII.

Parties to a litigation will not in general be permited, especially in a case like this, to oscillate in their defenses or to depart from the ground first taken. The jury may properly take into consideration the correspondence, especially the letter of February 26th, and the answer in the case and amendment thereto, both of which were verified by Fisher, as well as other testimony deemed material; they may inquire whether the statements and allegations made by the defendants at various times can be harmonized with the testimony given by Fisher when a witness in his own behalf; and if the jury become convinced from the evidence that Fisher is oscillating in his version of this transaction and in his statements as to the real understanding and agreement between the parties, then this issue of fraud and misrepresentation must be found in favor of the plaintiff.

Refused. Exception by plaintiff.

104 XVIII.

When a party gives a reason for his conduct, touching anything involved in a controversy, he is estopped after suit brought to change his ground. In view of this rule of law, as laid down by the United States Supreme Court, it becomes the duty of this jury to scrutinize closely the statements and reasons given by the defendants in their letter of February 26th, and see whether they can be possibly harmonized with their position, as now assumed upon the record by way of answer and testimony. If found conflicting there is certainly just cause for suspicion.

Refused. Exception by plaintiff.

XIX.

The various pleas of fraud set up by way of answer and amendment thereto, are not substantiated by the evidence.

Refused. Exception by plaintiff.

XX.

The defendants cannot be permitted to defend on the ground of fraud, thus repudiating the written contract of March 28th, 1890, while at the same time retaining the fruits of it. The answer in this case is not accompanied by a tender or offer to return the prop-

erty, which has come to the hands and possession of the defendants; nor does it anywhere appear from the answer or the proofs that there is a continuous readiness or willingness to return said property, or any part of the same; and it would not be just that the defendants be permitted to retain any part of this work without paying therefor.

Refused. Exception by plaintiff.

The above instructions—all and singular—were however refused except No. XIV, substantially covered by the general charge. To which ruling thus to instruct, or to give the substance of the instruction asked, the plaintiff then and there excepted, as above particularly noted in the record.

The court thereupon charged the jury as follows:

GENTLEMEN OF THE JURY: This action is brought to recover the contract price of views of Salt Lake City, stationery and advertising material; also damages for a refusal to take bottle labels stated in the complaint. The paper set out in the complaint, and in evidence before you with the alleged approvals and delivery of the
105 articles, the plaintiff relies upon, as his cause of action, and if you believe from a preponderance of the evidence that the same was executed *in good faith*, and complied with by the plaintiff, and delivery was duly made to the defendant, you should find for the plaintiff.

(The plaintiff excepted to the interpolation of the words "in good faith.")

The court further charges you, that if you believe from the evidence that the words "all terms and conditions included in above, read and agreed" were written above defendant's signature to the contract after the defendant signed it, and without his consent, that such insertion invalidated the contract, *and the plaintiff cannot recover, unless the evidence shows that the defendant, after he knew of such insertion, accepted the articles in pursuance of the contract.*

(To the latter part of which proposition, underscored as above, plaintiff excepted.)

And the same rule would apply to words written over the signature of the defendant after he placed it on the views, stationery and advertising matter; if so written without the defendant's consent, such language should receive and be given no force or effect.

If the representations in the amended answer were made as therein set out, and were false, and were within the knowledge of the plaintiff's agents when they made it, and they were relied upon by the defendant, and the defendant was ignorant of the prices as therein stated, as alleged in the answer, the defendant has a right to avoid the contract, unless the evidence shows that after knowing they were false he accepted the articles according to the contract.

(To which charge, as above underscored, plaintiff duly excepted.)

The court further charges you that if the contract sued on was made on Sunday, it is invalid unless the defendant agreed to comply with it, and afterwards accepted the goods from the plaintiff in pursuance of it.

If the words were inserted without the consent of the defendant or the false representations were made as alleged, or the contract was made on Sunday, the defendant after knowing of the same afterwards consented to carry out the contract and receive the goods or articles, it would be binding.

The court further charges you that if the defendant had reasonable time and a reasonable opportunity to examine the articles after they reached him, and if found contrary to the contract or not included in it, a reasonable time to notify the plaintiff of his refusal to accept, and offer to return such articles, the defendant was bound to act in good faith and with reasonable diligence.

106 In finding the compensation value and prices, you should find the customary compensation, values and prices, such as persons or houses usually give or take for such articles.

The burden is on the plaintiff to prove the contract and to explain interlineations, and show a compliance of the contract and offer to comply on its part. The burden is upon the defendants to prove false representations and allegations of fraud. Fraud is never presumed. It must be proven by the party alleging it by a preponderance of the evidence. If you find a valid contract to deliver and accept bottle labels, as stated in the plaintiff's complaint, and that the plaintiff was ready and willing to comply, and that the defendant notified the plaintiff that he would not accept them, you should allow as damages to the plaintiff for such refusal, the difference between the contract price and the cost of production.

If you find a conflict in the testimony, you should reconcile it if you can, upon any reasonable hypothesis. If you cannot you must determine what you will believe.

You are the judges of the credibility of the witnesses who have testified before you, and in judging of their credibility you have a right to take into consideration their deportment upon the witness stand, the interest that they may have in the result of the suit, as it appears from the evidence; their motives to speak truly or falsely so far as it appears from the evidence; the fact that their statements may be reasonable or unreasonable in the light of the evidence; their apparent frankness or candor or the want of it; their opportunities to understand and know that to which they testify and their capacity to remember; in fact, you have a right to take into consideration any fact in evidence which in your judgment affects the credibility of any witness.

It is your duty to weigh the evidence, and in doing so, you should consider it altogether. You should not pick out any particular fact or any particular statement of any witness and give it undue weight. You should consider it all together and give to the testimony of each witness just such weight as you think it is entitled to.

You should give such weight to inferences from the facts as you think they are entitled to. You should consider the evidence impartially and fairly. You are the judges of the fact.

If you find the issues for the plaintiff, you will be governed by the prices in the written contract, so far as the prices are fixed in it;

and as to such as are not, you will allow the prices agreed
107 upon, if you find from the evidence that any such prices were agreed upon afterwards, and if not, then the customary compensation or price; and you will allow eight per cent. per annum on the amount you find, from the time of the delivery of the goods, on such as were delivered; and those to be delivered in the future, and refused by the defendant, the difference between the contract price, and the cost of production, and you will state in your verdict the amount that you so find.

If you find for the defendant you will state in your verdict "We, the jury, find the issues for the defendant."

The court further charges you that the concurrence of nine or more members of the jury is essential to your verdict, and that all who agree to it should sign it.

(To which last charge the plaintiff duly excepted.)

The jury having retired and deliberated, returned a written verdict into court on the 12th day of December, 1892, "finding the issues for the defendant," signed by nine (9) of its members—the others refusing to concur therein. Which verdict the court then and there received and caused to be entered upon the record.

To which action of the court the plaintiff excepted.

That thereafter and within ten days after the verdict of the jury, to wit, on December 19th, 1892, plaintiff duly served and filed a notice of its intention to move to vacate and set aside the verdict of the jury herein, and grant a new trial of the action on the following grounds:

"1st. Insufficiency of the evidence to justify the verdict.

"2d. That the verdict is against law.

"3d. Errors in law occurring at the trial and excepted to by plaintiffs; and

"That said motion would be made upon a bill of exceptions hereafter to be prepared and settled."

That on the same day the court by its order duly made and given extended the time within which the plaintiff might prepare and serve its bill of exceptions on the motion for a new trial, to February 19th, 1893. That on February 14th, 1893, the court by its order duly made and given again extended the time within which to prepare and serve its bill of exceptions on motion for a new trial herein to March 15th, 1893.

108 (Title.)

Assignment or Specifications of Errors in Law Occurring on the Trial and Duly Excepted to.

And now comes the said plaintiff and assigns that, in the record and proceedings aforesaid, there is manifest error in this, to wit:

1st. The court erred in overruling the question at folio 23, and excluding evidence of the general state of the art as thereby proposed. (Abst., pp. 20–'1.)

2d. The court erred in overruling the plaintiff's objection at folio

61 to the introduction of any and all evidence under the pretended plea of fraud. (Abst., pp. 43–'4.)

3d. The court erred at folio 67 in overruling the objections to the proposed amended answer, as particularly noted in the record. (Abst., p. 44.)

4th. The court erred at folio 68, when allowing the pretended plea of fraud to be amended in the midst of the pending trial. (Abst., p. 44).

5th. The court erred at folio 68, when denying the plaintiff's motion to have the defendant- elect upon which of the two pleas of fraud they intended to rely. (Abst., pp. 44–'4.)

6th. The court erred at folio 73 in allowing evidence to be adduced not warranted by the pleadings, and at variance with the written contract between the parties. (Abst., pp. 46–'7.)

7th. The court erred at folio 80 in allowing evidence to be adduced on the defense as to the value of this lithographic work. (Abst., p. 49.)

8th. The court erred at folio 85 in allowing the defendant Fisher to testify that all and singular the approvals and writings upon the cards and other exhibits were inserted after the defendant's name had been endorsed or written thereon. (Abst., p. 51.)

9th. The court likewise erred at folio 89 in allowing the defendant Fisher to testify that all that writing was put there, must have been put there, without his knowledge or consent. (Abst., p. 53.)

10th. The court erred at folios 131–'2 in allowing evidence to be adduced of the market value of this and other lithographic work. (Abst., p. 70.)

11th. The court erred at folio 173 in ruling out evidence of the absence of any fraudulent intent on part of the plaintiff or its agents. (Abst., p. 86.)

12th. The court erred at folio 201 in refusing leave to conform the complaint to the facts proven. (Abst., p. 107.)

109 13th. The court erred when refusing the plaintiff's prayer for instructions Nos. I, II, III, IV, VI, VII, VIII, IX, X, XI, XVI, XVII, XVIII, XIX, XX. (Abst., pp. 108–'20.)

14th. The court erred in its charge to the jury at folios 232, 233, 234 and 241 as particularly noted in the bill of exceptions. (Abst., pp. 121, 122, 124.)

15th. The court erred at folio 242, in receiving and causing to be entered on the record what purported to be a verdict of the jury. (Abst., pp. 124–'5.)

And the plaintiff further says that in the record and proceedings aforesaid, there was manifest error in this, to wit, that the evidence is insufficient to justify the verdict, in that

1st. The defendants have utterly failed in making good their pretended plea of fraud or false representations as set up by way of original answer.

2d. The evidence utterly fails to support or substantiate the pretended fraud and plea of false representations set up by way of amendment to the answer.

3d. The evidence does not support the pretended plea of invalidity of the contract, because entered into on Sunday.

4th. The evidence fails to show any offer to return any of the lithographic work, which is said not to have been ordered.

5th. The evidence does not disclose any tender or offer to pay for any part of the work received by the defendants and retained by them.

6th. For all that appears on part of the defendants, the plaintiff was entitled to a verdict as prayed for by the complaint on the undisputed evidence.

7th. The finding of the jury is not supported by the preponderance of the evidence.

8th. The verdict is contrary to law and evidence.

And the plaintiff further says that in the record and proceedings aforesaid there is also manifest error in receiving and causing to be entered of record as the verdict in this case, a pretended finding of nine jurors, the balance not concurring therein, all of which is respectfully submitted.

110 And because none of the aforesaid matters (except the verdict) appear of record, the said judge has caused this bill of exceptions to be duly settled and allowed, and has thereupon caused all and singular the foregoing to be made manifest and certified to by his hand and seal in conformity to the practice of this court and the orders in that behalf previously made and entered.

Done this 12th day of May, 1893, *nunc pro tunc* as of March 20th, 1893.

C. S. ZANE. [L. S.]

Endorsed: Title of court and cause. No. 9323. Bill of exceptions on motion for a new trial. Dey & Street, plaintiff's attorneys. Filed March 20th, 1893. Henry G. McMillan, clerk. Service of the within admitted this 1st day of March, 1893. Rawlins & Critchlow.

111 *Motion to Retax Costs.*

Title of Court and Cause.

To the said defendants and to Rawlins & Critchlow, their attorneys.

GENTLEMEN: Please take notice that on the 24th day of Dec., 1892, at the hour of ten o'clock a. m., or as soon thereafter as counsel can be heard, at the Federal court-room, in the Dooly building, Salt Lake City, Utah, the said plaintiff will move the court to retax the costs herein in the following particulars:

1. The item of $82.60, reporter's fees, transcribing testimony, so far as the same exceeds the sum of $60.00 for reporting;
2. The item of $25.00, deposition of J. C. Williams;
3. The item of witness fees and mileage for F. M. Bishop of $10.70;
4. The item of witness fees and mileage for M. Wagner of $12.20;

5. The item of witness fees and mileage for J. C. Pauli, $32.00, for the reason that the same are excessive, unjust, and illegal.

Dated December 17th, 1892.

DEY & STREET,
Plaintiff's Attorneys.

Endorsed: No. 9323. Title of court and cause. Motion to retax costs. Filed December 19th, 1892. Henry G. McMillan, clerk, by Geo. D. Loomis, dep. Service by copy acknowledged this 19th day of Dec., 1892. Rawlins & C., att'ys for def'ts.

Motion for New Trial.

Title of Court and Cause.

To the said defendants and to Messrs. Rawlins & Critchlow, their att'ys.

GENTLEMEN: You are hereby notified that the plaintiff herein intends to and will move the court to vacate and set aside the verdict of the jury herein rendered against said plaintiff and in favor of the said defendants on the 12th day of December, 1892, and to grant a new trial of the action on the following grounds:

1. Insufficiency of the evidence to justify the verdict.
2. That the verdict is against law.
3. Errors in law occurring at the trial and excepted to by the plaintiff.

Said motion will be made upon a bill of exceptions hereafter to be prepared and settled.

Dated December 17th, 1892.

DEY & STREET,
Plaintiff's Attorneys.

Endorsed: No. 9323. Title of court and cause. Notice of motion for new trial. Filed December 19th, 1892. Henry G. McMillan, clerk, by Geo. D. Loomis, deputy. Service by copy acknowledged this 19th day of December, 1892. Rawlins & Critchlow, attorneys for defendants.

112 Title of Court and Cause.

The motion of the plaintiff to retax costs being submitted by counsel and the amount of $22.60 reporter's fees objected to is disallowed by the court and the costs are retaxed accordingly at $22.60 less than the original amount.

Order made in open court and entered on the minutes of the clerk under date of May 12th, 1893.

Title of Court and Cause.

The motion of the plaintiff for a new trial herein being submitted upon the settled statement by the attorneys of the parties, and the court being of the opinion that no sufficient reason appears for

granting a new trial and that the verdict is sustained by the law and evidence, it is ordered that said motion for a new trial be, and the same is hereby, overruled, and plaintiffs excepts.

Order made in open court and entered on the minutes of the clerk under date of May 12th, 1893.

Notice of Appeal.

Title of Court and Cause.

To the above-named defendants and to their attorneys, Messrs. Rawlins & Critchlow, and to the clerk of said court.

GENTLEMEN: You are notified that the plaintiff appeals to the supreme court of Utah Territory from the whole and every part of the judgment rendered herein in favor of the defendants and against the plaintiff on the 14th of December, 1892, and from the whole and every part of the order made herein on the 12th day of May, 1893, overruling plaintiff's motion for a new trial and refusing a new trial of the action.

Dated July 1st, 1893.

DEY & STREET,
Plaintiff's Attorneys.

Endorsed: Title of court and cause. Notice of appeal. Service of a copy of within admitted July 1st, 1893. Rawlins & Critchlow, def'ts' att'ys. Filed July 1st, 1893. Henry G. McMillan, clerk.

113 *Undertaking on Appe-l.*

Title of Court and Cause.

Whereas the plaintiff in the above-entitled action is about to appeal to the supreme court of Utah Territory from the whole and every part of the judgment herein, rendered on December 14th, 1892, in favor of the defendants and against the plaintiff, and from the whole and every part of the order made on May 12th, 1893, overruling the plaintiff's motion for and refusing a new trial of the action:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned plaintiff, as principal, and Chas. C. Dey and John A. Street, of Salt Lake county, Utah Territory, as sureties, do hereby jointly and severally undertake and promise on the part of the appellant that the appellant will pay all damages and costs which may be awarded against it on the appeal or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound; and

Whereas the said appellant is desirous of staying the execution of said judgment so appealed from as to the amount of *of* costs and damages, to wit, two hundred and thirty-eight and $\frac{60}{100}$ dollars, adjudged in favor of the defendants and against the plaintiff:

Now, we do further, in consideration thereof and of the promises,

jointly and severally undertake and promise and do acknowledge ourselves further jointly and severally bound in the further sum of four hundred and seventy-seven and $\frac{20}{100}$ dollars, being double the amount named in said judgment for said costs and damages, that if the judgment appealed from or any part thereof, or the order appealed from in that respect be affirmed, or the appeal be dismissed, the appellant shall and will pay the amount directed to be paid thereby or the part of such amount as to which the same shall be affirmed if affirmed only in part, and all damages and costs which shall be awarded against appellant upon the appeal, and that if the appellant do not make such payment within thirty days after the filing of the remittitur from the supreme court, from which the appeal is taken, judgment may be entered, on motion of the respondents, in their favor and against the undersigned sureties for such amount, together with the interest that may be due thereon and the damages and costs which may be awarded against the appellant on the appeal.

Dated July 3rd, 1893.

AMERICAN PUBLISHING CO.,
By DEY & STREET, *Its Att'ys.*
JOHN A. STREET.
CHAS. C. DEY.

114 TERRITORY OF UTAH, } ss:
Salt Lake County, }

Chas. C. Dey and John A. Street, the sureties on the foregoing undertaking, being first duly sworn, each for himself deposes and says that he is a resident of said Salt Lake county, Utah Territory, and a freeholder therein; that he is worth the aggregate of the sums mentioned in the said bond as the penalties thereof, to wit, the sum of seven hundred and seventy-eight dollars, over and above all his debts and liabilities and exclusive of property exempt from seizure or sale under execution.

CHAS. C. DEY.
JOHN A. STREET.

Subscribed and sworn to before me this 3rd day of July, 1893.

ANTHONY KOENEN,
[SEAL.] *Notary Public.*

Endorsed: Title of court and cause. Filed July 1st, 1893. Henry G. McMillan, clerk.

We, the undersigned, attorneys for the respective parties in the above-entitled action, do hereby certify that the foregoing is a correct, full, and true transcript of the record in said cause, together with the notice of appeal and undertaking.

DEY & STREET,
Att'ys for Pl'tf and Appellant.
RAWLINS & CRITCHLOW,
Att'ys for Def't and Respondent.

115 In the Supreme Court of Utah Territory, Regular January Term.

AMERICAN PUBLISHING COMPANY, Appellant, *vs.* A. FISHER *et al.*, Respondents. } Appeal from 3rd Dist.—C. S. Zane, Judge.

WEDNESDAY, *March 21st*, 1894.

This cause, coming on regularly for hearing, was argued by Chas. C. Dey, Esq., in behalf of appellants; by Arthur Brown and E. B. Critchlow, Esqrs., in reply; was submitted and taken under advisement.

Regular June term.

Title of Court and Cause.

TUESDAY, *June* 12, 1894.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now, here, considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed.

115½ In the Supreme Court of Utah Territory, Regular June Term.

AMERICAN PUBLISHING CO., Appellant, *vs.* A. FISHER *et al.*

WEDNESDAY, *June 13th*, 1894.

In this cause counsel for appellants ask that the court fix the amount of a supersedeas bond and bond for costs to be given on writ of error removing this cause to the Supreme Court of the United States, and it was ordered that such bond in supersedeas be, and is hereby, fixed in the sum of five hundred ($500.00) dollars and the bond for costs in the sum of $300.00.

116 In the Supreme Court of Utah Territory.

AMERICAN PUBLISHING COMPANY, Appellant, *vs.* A. FISHER *et al.* } No. 429.

SMITH, *J.*:

This is an action by the plaintiff to recover of defendants $20,844.75 claimed to be due upon a written contract, which is set out in the complaint and is in words and figures as follows:

"MARCH 28TH, 1890.

"A. Fisher Brewing Company, Salt Lake City, Utah.

"GENTLEMEN: Will submit sketch for your trade-mark with sketch for your bottle labels, also submitting finished proofs of plates, and will furnish you with one and one-half (1½ million) million

labels in the course of a year after the proofs have been made, in black and bronze, with trade-mark inserted, at fifty-five cents (55c.) per M labels, and will duplicate this first year's shipment in each of the following five years at same rate after the expiration of this first year. Will also submit six different kinds of sketches for small advertising cards on style of cards submitted, printed in colors in front and black on back, furnishing you with 50 M of each kind of cards after sketches have been submitted, as soon as ready, at $9.75 per M cards. We shall also insert your trade-mark and compliment card on your edition of the panoramic view of Salt Lake City,
117 and will furnish you with 10 M copies of said Salt Lake City view with trade-mark inserted after sketch of trade-mark has been submitted to you, as soon as ready, at 97cc. per copy (ninety-seven cents) *per copy* of said view; will attend to application for registration of your trade-mark for you, and will submit designs for your different stationary headings and for a hanger in course of a year, with your trade-mark embodied on same, furnishing you with 10 M of each kind of the following stationary, as soon as ready, viz: Letter-heads 8½ x 11, letter-heads 8½ x 5½, note-heads 5½ x 8½, statements 5½ x 8½, bills 8½ x 7, business cards and envelopes. Will also send you proof of bock card submitted in spring 1891. Price of hangers and price of bock cards, in colors, is 37½c. apiece (all prices are made on goods at our office at Milwaukee) with your name and trade-mark inserted, and will furnish you 300 bock cards for the season of 1891. Terms, cash on delivery.

"Very truly yours,

"AMERICAN PUBLISHING CO. OF MILWAUKEE, WIS.,
"Per A. E. COTZHAUSEN, *Treas.*

"All terms and conditions included in above approved; read and agreed.

"A. FISHER BR'Y CO.
"A. FISHER."

(Signed in duplicate.)

The complaint alleges in substance that plaintiff substantially performed said contract on its part, except as to certain particulars wherein it was prevented by defendant-, and alleges that defendant- has paid no part of the sums due for articles furnished under said contract.

The defendants answered, denying that they ever made the contract sued on, and allege that it was fraudulently altered and
118 is a forgery, but allege affirmatively that, owing to certain statements of the representative of plaintiff, they did indorse their firm name on the proposal of plaintiff, but with the express understanding that it was in no sense a contract and was for an entirely different purpose, and that it was at the time so understood by both parties.

The answer also sets out at great length an explanation of the

reasons why the defendants approved certain designs for work afterwards done by plaintiff.

Upon the trial a verdict was rendered in favor of defendants, concurred in by nine jurors.

A motion for a new trial was overruled, and plaintiff appeals.

The alteration which it is claimed was made in the contract sued on, and which defendants claim rendered it a forgery, was the interlineation above the name of defendants' firm, as indorsed on the proposal, of the words "All terms and conditions included in above approved, read, and agreed."

The evidence as to whether these words were interlined after the defendants indorsed the contract was certainly squarely in conflict. The question was submitted to the jury, and they found it to be a forgery. We do not feel that we would be authorized to disturb their verdict.

We think the alteration alleged to have been made and set out above was material, and if the writing had been a contract before the alterations would have had the effect to destroy it and render it a nullity, and of course if it was not a contract before, the unauthorized addition of these words could never make it one.

Very slight alterations in a written instrument made after it is signed by the obligor, if made without his knowledge or consent, and made by a party interested in the contract or at the in-
119 stance of such party, will destroy the instrument altogether.

See Robinson *vs.* Reed, 46 Iowa, 219.

Addison on Contracts, vol. 2, *pp.* 853.

Bigelow on Fraud, 255, and cases cited in note.

In the brief of appellant we are urged to set aside the verdict because the evidence fails to sustain the plea of fraudulent interlineation, and the same matter was earnestly presented in the oral argument. But there was evidence in the case from which the jury would have been justified in finding that the interlineations, both in the original contract and in the approvals, were made as claimed by defendant, so that we cannot disturb their finding.

The appellant also urges that, admitting that the alterations were made as claimed by defendant and were unauthorized, still it does not detract from or add to the agreement.

We have already said that we are of opinion that the alterations were material, and a very casual reading of the contract, as set out in the complaint and copied in this opinion above, will, it seems to us, convince any one that the words added above the firm name of defendant, to wit, "all terms and conditions included in above approved, read, and agreed," are of vital importance in determining the meaning and legal effect of the entire instrument. Without these word- the explanation offered by defendant as to why he signed the paper at all and his claim that he did so merely to show that the salesman of plaintiff had called on his firm and made the offer contained in the writing as a basis for future orders for supplies is a reasonable one. With these words in the writing, it is impossible for ony one to believe that explanation. With these

words added, the writing appears to be a perfect contract, consisting of an offer and acceptance.

120 It is not our purpose to discuss at length the evidence introduced or attempt to say who ought to be believed or who should be disbelieved. We do say, however, that the entire transaction, so far as the plaintiff is concerned, bears all the evidence of the rankes- kind of fraud and imposition upon the defendants. If this transaction is to be upheld the defendants will be compelled to pay for enough advertising matter to run them for an indefinite period of time, variously estimated at from ten to one hundred years, the same being of a character that would ordinarily be changed each season.

It may be said the courts are not guardians for business men who make foolish and improvident contracts, and the appellant here urges this thought upon our consideration, and we concede that it is, in a large measure, correct. But where, as in this case, the alleged maker of such a contract denies that he made it, then the nature of the bargain, it being one of such a ruinous character as the one under consideration, is quite cogent evidence *evidence* that no sane business man ever entered into it except he was imposed upon by some unfair means.

The course of dealing carried on by the plaintiff, as shown by the record, is certainly very singular and bears evidence of a deliberate conspiracy *the* entrap the defendants.

Such being the tendency of the entire evidence, it is not difficult to see how the jury, even upon the statement of the defendant Fisher alone, found that contract, so called, had been fraudulently altered, even though their verdict was equivalent to a verdict of guilty of forgery against the agent of plaintiff. One other objection urged here is that defendants were permitted to amend their answer on the trial and after the introduction of testimony was begun. The amendment was allowed without previous no-

121 tice, but no objection was made on this ground. "The court may, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, and amendment to any pleading, etc."

Sec. 3256, Compiled Laws Utah.

Terms were imposed as a condition of filing the amendment complained of, there being no objection on the ground that it was without notice. We think there was no abuse of discretion.

The last objection urged is that the verdict was rendered by only nine jurors. This matter we have recently fully passed upon, and in our opinion the law authorizing a verdict by nine or more jurors in a civil case is valid.

Hess *vs.* White, 33 Pac. Rep., 243.

We are aware that two other territorial supreme courts on a like statute *has* taken a contrary view since the opinion in Hess *vs.* White was rendered, and one territorial supreme court has decided practically in accordance with our view. We adhere to the rule we

have already declared on this subject. We do not deem it necessary to notice other matters in the brief of appellant.

The appellant's brief nowhere contains a concise statement of the points or any point on which a reversal is asked. While it is very lengthy, it is difficult to determine from it just what occurred in the district court that is complained of here.

We have discussed all the matters which we think are presentby the record, although we have omitted several about which appellant's brief has much to say.

The judgment of the district court is affirmed with costs.

We concur.

MERRITT, *C. J.*
MINER, *J.*
BARTCH, *J.*

Endorsed: Title court and cause. Opinion. Filed June 12, 1894. Jos. P. Bache, clerk.

122 UNITED STATES OF AMERICA, *ss:*

To A. Fisher and Aaron Keyser, copartners, doing business under the firm name of A. Fisher Brewing Co., and to Rawlins and Critchlow and Brown and Henderson, their attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein American Publishing Company (a corporation) is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George W. Bartch, a justice of the supreme court of the Territory of Utah, this 14th day of August, in the year of our Lord one thousand eight hundred and ninety-four.

GEORGE W. BARTCH,
Associate Justice, Supreme Court of Utah.

[Seal Supreme Court, Territory of Utah, United States of America.]

Attest: JOSEPH P. BACHE,
Clerk Supreme Court of Utah Territory.

[Endorsed:] Filed Aug. 15th, 1894. Jos. P. Bache, clerk supreme court of Utah Territory.

A copy of the within citation served on us this 15th day of August, 1894.

RAWLINS & CRITCHLOW,
BROWN & HENDERSON,
Attorneys — Defendants in Error.

123 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between American Publishing Company, appellant, and A. Fisher and Aaron Keyser, copartners, doing business under the firm name of A. Fisher Brewing Company, respondent, a manifest error hath happened, to the great damage of the said American Publishing Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date hereof, at the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Supreme Court, Territory of Utah, United States of America.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14 day of Aug., in the year of our Lord one thousand eight hundred and ninety-four.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah Territory.

[Endorsed:] Supreme court of Utah. File No., 429. American Publishing Co., appellant, *vs.* A. Fisher *et al.* Writ of error. Original.

124 Supreme Court of the Territory of Utah.

AMERICAN PUBLISHING COMPANY
vs.
A. FISHER and AARON KEYSER, Copartners, Doing Business under the Firm Name of A. Fisher Brewing Company. } Assignment of Errors.

And now comes the said plaintiff and appellant and assigns that in the record and proceedings of the district court and also of the supreme court, which affirmed the judgment of the court below, there is manifest error in this, to wit:

I.

The supreme court in its official opinion has given expression to a spirit of partiality and local prejudice altogether uncalled for and

unwarranted by anything that appears of record—in particular by saying:

"It is not our purpose to discuss at length the evidence introduced, or to attempt to say who ought to be believed or who should be disbelieved. We do say, however, that the entire transaction, so far as the plaintiff is concerned, bears all the evidence of the rankest kind of fraud and imposition upon the defendants. If this transaction is to be upheld, the defendants will be compelled to pay for enough advertising matter to run them for an indefinite period of time, variously estimated at from ten to one hundred years, the
125 same being of a character that would ordinarily be changed each season."

Again, when the court intimates—

"That the nature of the bargain is of such a ruinous character that it is quite cogent evidence that no sane business man ever entered into it except he was imposed upon by some unfair means."

Again, that—

"The course of dealing carried on by the plaintiff, as shown by the record, is certainly very singular and bears evidence of a deliberate conspiracy to entrap the defendants."

Again, in asserting that—

"The appellant's brief nowhere contains a concise statement of the points or any point on which a reversal is asked. While it is very lengthy, it is difficult to determine from it just what occurred in the district court that is complained of here."

Furthermore, in saying that—

"We have discussed all the matters which we think are presented by the record, although we have omitted several about which the appellant's brief has much to say."

II.

The supreme court erred in assuming that the jury, upon a square conflict of evidence, found the written instrument to be subsequently altered and a forgery.

III.

The supreme court erred in its conclusion that the entire
126 transaction, so far as the plaintiff is concerned, bears all the evidence of the rankest fraud and imposition.

IV.

The supreme court erred in finding that the course of dealing carried on by the plaintiff, as shown by the record, is certainly very singular, and bears the evidence of a deliberate conspiracy to entrap the defendants.

V.

The supreme court erred in its construction of the pleadings, and especially as to the sufficiency of the defendant's plea of subsequent alteration and fraudulent pretenses.

VI.

The supreme court erred in ignoring the admission of the defendants as to certain work actually ordered and accepted.

VII.

The supreme court also erred in ignoring the fact that no offer to return the lithographic work nor to pay for what was actually ordered and received was either alleged or proven.

VIII.

The supreme court erred in upholding the order of the court below amending and changing the plea of fraud after the plaintiff had rested.

IX.

The supreme court erred in assuming that the pretended alteration covered the words:

"All terms and conditions included in above approved, read, and agreed," whereas the original document on file shows the
127 interlineation to be confined to the words "read and agreed."

X.

The supreme court erred in holding that there was any legal evidence in the case from which the jury would have been justified in finding that the interlineations, both in the original contract and in the approvals, were fraudulently made and inserted, as claimed by the defendants.

XI.

The supreme court erred in upholding the verdict concurred in by but nine jurors.

XII.

The supreme court erred in affirming the judgment of the court below.

XIII.

The plaintiff reiterates and assigns the numerous specifications of errors in law which occurred on the trial in the court below, and which were then and there duly excepted to, as particularly set forth on top pages 126 to 129 of the printed abstract prepared for use of the supreme court of the Territory of Utah, the same being in the words and figures following, to wit:

And now comes the said plaintiff and assigns that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The court erred in overruling the question at folio 23, and excluding evidence of the general state of the art as thereby proposed. (Abst., pp. 20, 21.)

The question and the ruling of the court *is* as follows:

"Q. I call your attention now to the agreement of March
128 28, 1890, and so that the court and jury may properly understand the meaning of some technical terms used in the paper, and correctly apply its language to the subject-matter and surrounding circumstances. Will you please state in a summary manner the art and process of lithographing involved in the execution of work of this character; which question was objected to, and the objection sustained, the court holding that no evidence should be received, except to explain the technical terms, if any, used in the agreement; to which ruling the plaintiff then and there duly excepted."

2nd. The court erred in overruling the plaintiff's objection at folio 61 to the introduction of any and all evidence under the pretended plea of fraud. (Abst., pp. 43, '4.)

Plaintiff's objection and the ruling of the court *is* as follows:

"A. Fisher was thereupon called and sworn as a witness in his own behalf.

At this stage of the proceedings the plaintiff interposed an objection to any and all evidence under the answer tending to establish the pretended plea of fraud or false representation, as therein set out at length, because insufficient in law as matter of defense. This objection was overruled by the court; to which ruling the plaintiff then and there duly excepted."

3rd. The court erred at folio 67 in overruling the objections to the proposed amended answer, as particularly noted in the record. (Abst., p. 44.)

We refer to the amended answer, which constitutes a part of the record.

The objection of the plaintiff and the ruling of the court *is* as follows:

129 "To this amendment the plaintiff objected on the grounds:

1st. Because insufficient in law upon its face.

2nd. Inconsistent with former plea.

3rd. A plea of fraud ought not to be amended on the trial so as to add new ground thereto.

4th. The plaintiff is taken by surprise and not prepared to go into a new issue.

But the court overruled the objection and allowed the amendment giving the plaintiff the election, if taken by surprise, of asking and obtaining a continuance, the defendants paying the taxable costs of the term; to all of which rulings the plaintiff duly excepted."

4th. The court erred at folio 68 when allowing the pretended plea of fraud to be amended in the midst of the pending trial. (Abst., p. 44.)

We refer to the objection of the plaintiff and the rulings of the court, *supra*.

5th. The court erred at folio 68 when denying the plaintiff's motion to have the defendants elect upon which of the two pleas of fraud they intended to rely. (Abst., pp. 44, '5.)

Plaintiff's motion and the ruling of the court *is* as follows:

"Leave thus to amend having been granted, the plaintiff moved that the defendants be made to elect upon which of the two pleas of fraud they now intended to rely, for the reason that the fraud set up by way of amendment was inconsistent with the plea in the original answer; which motion was denied by the court and an exception duly entered.

The plaintiff being unwilling to submit at this stage of
130 the proceedings to a continuance of the cause on receipt merely of the taxable costs of the term, a further exception was duly taken, and thereupon counsel announced their readiness to go on with the trial."

6th. The court erred at folio 73 in allowing evidence to be adduced not warranted by the pleadings and at variance with the written contract between the parties (Abst., pp. 46, 7). The evidence adduced and the objection of the plaintiff *is* as follows:

"The examination of A. Fisher was resumed and continued as follows: I met Mr. Cotzhausen at the brewery on the 30th of March, 1890. It was on one Sunday afternoon at half past two. I had met him in town the day previous, when he told me that he would come down some time and see me in regards—he says he wants to buy real estate, so when he came down he asked me whether I had any real estate for sale. I told him I didn't have any for sale. All the land we had we needed. I knew beforehand he was connected with a lithographing house, and then he spoke to me about it; told me he was the secretary of the firm; that he used to be a travelling man for them, and then he suggested if I would not like to have a trade-mark made for our beer labels. I had been thinking of getting a trade-mark made for some time before. I asked him about these trade-marks. In fact, he already seemed to be familiar with our beer labels. He said he had seen our beer label which we had used on our bottles; also inquired the price which we had been paying, and he talked to me about how many colors our
131 labels had then. He liked to make us a label which would be much stylisher with our trade-mark on. He asked me what I paid. I told him. I think the price was 55 cents at the rate of half a million at the time. This I told him was about as much as I used in a year, so he suggested that he would make us a label for 75 cents a thousand, with the trade-mark inserted. I told him I did not want any label at such price, and at last he said, If you get a million and a half, that would be about right. You are using now half a million. A million and a half would only last three years, so he would make them at 55 cents. Remember, he says, I cannot make you them labels right away. We could only make them between, when business is dull. 'I will furnish you with labels, so you won't get out of stock, and you will always have some on hand. We will make you some now, and then make you some next year; make them at one time when I have time, but I won't let you get out of stock. After talking things over I told him, 'Well, I will take a million and a half,' but he says, 'Never mind, then. You don't need to give an order for them now.' I said, Cer-

tainly I wouldn't give you any order now without seeing sample. He says, 'Yes, I will get you a trade-mark made, then I will submit you samples, and then you can judge.' Then he furthermore said, 'Now, the best way you could do—get yourself a trade-mark, or we get it made. It won't cost you anything. If you take these labels we can afford to have that trade-mark made. Leave it with us, and then we can make up all your stationery. We can do you better work and cheaper work than any other lithographing house out.' Then he says, I will tell you what I will do."

132 Plaintiff's counsel:

"We desire at this time to object again—once for all, without further repetition—to all the foregoing testimony and any and all parol evidence of a similar nature, because not warranted by the pleadings and at variance with the written contract between the parties."

The objection being overruled, an exception was duly taken.

7th. The court erred at folio 80 in allowing evidence to be adduced on the defense as to the value of this lithographic work. (Abst., p. 49.)

The objection and the evidence thereto *is* as follows:

"Q. Were you at all familiar with the price of any of these articles which he mentioned to you at the time?

Objected to by the plaintiff. Objection overruled and exception taken.

A. I was familiar with part; for instance, I knew what labels were worth, and also buck cards; I was not with the price of the other things. Our book-keeper, Williams, had attended to the buying of stationery for our firm."

8th. The court erred at folio 85 in allowing the defendant Fisher to testify that all and singular the approvals and writings upon the cards and other exhibits were inserted after the defendants' name had been endorsed or written thereon. (Abst., p. 51.)

The objection and the evidence thereto *is* as follows:

"Q. Was there any writing upon the cards or other exhibits (referring to Exhibit 7) above your name?

Objected to. Objection overruled. Exception by plaintiff.

133 A. It was all a blank—only my name was on, nothing else. The words, 'Accepted as per agreement of March 28, 1890,' were not on there. The same is true as to all the cards and exhibits that I ever seen. So was the card just a blank, which shows the words 'O. K. Silver, blue, and black,' and my signature below in pencil."

9th. The court likewise erred at folio 89 in allowing the defendant to testify that all that writing was put there, must have been put there, without his knowledge or consent. (Abst., p. 53.)

The evidence adduced and the objection thereto *is* as follows:

"Smith came with the bird's-eye view the latter part of December; Williams was present. I signed my name to the proof (Exhibit 11). When I put my signature on, there was nothing written

on there at all in ink. What now appears there was not put on with my knowledge or consent. We made some objections when Smith presented the proof. The pencil figures he put on at the time. There was something said about the Real Estate Exchange accepting or approving of it. There was also something written on there at the time in relation to that matter; it was written on the back with pencil.

Q. Did you ever consent to its being put there?

Same objection, ruling, and exception.

A. No; I didn't."

10th. The court erred at folios 131, '2 in allowing evidence to be adduced of the market value of this and other lithographic work. (Abst., p. 70.)

Defendant's question and the objection there- *is* as follows:

"Q. Are you able to state what the aggregate market
134 value of all these things is, including the entire expense connected with it?

To which question the plaintiff objected; but the objection was overruled, and an exception duly taken; whereupon the witness answered."

11th. The court erred at folio 173 in ruling out evidence of the absence of any fraudulent intent on part of plaintiff or its agents (Abst., p. 86). Plaintiff's question and the ruling of the court *is* as follows:

"Q. Now, I ask you whether you at any time in your dealings with Fisher, personally or otherwise, intentionally or unintentionally, did anything to mislead him?

Question objected to; objection sustained, and exception taken by plaintiff."

12th. The court erred at folio 201 in refusing leave to conform the complaint to the facts proven (Abst., p. 107). Plaintiff's motion and the ruling of the court *is* as follows:

"At this stage of the proceedings plaintiff's counsel moved the court for leave to conform the complaint to the facts proven, so as to cover the check book, and inserting an allegation to the effect that the stationery was reasonably worth $14.75 per thousand, which amount the defendants agreed to pay therefor.

Objected to; objection sustained; to which ruling the plaintiff duly excepted."

13th. The court erred when refusing the plaintiff's prayer for instructions Nos. I, II, III, IV, VI, VII, VIII, IX, X, XI, XVI, XVII, XVIII, XIX, XX (Abst., p. 108–'20). The instructions prayed for by the plaintiff are as follows:

135 "Both parties having rested, the plaintiff submitted to the court in writing the following instructions and prayed that the same be given to the jury, to wit:

Plaintiff's Instructions.

I.

The defendants set up in avoidance of liability that the written instrument under date of March 28, 1890, was reduced to writing and signed March 30, this being Sunday. Mr. Fisher assigns no reason why the paper was made to bear a different date. Whether it was in point of fact made and concluded on Sunday is a question of fact, which ordinarily the jury would have to determine from the preponderance of the evidence. The paper is presumed to be executed when it bears date, and evidence to the contrary must be clear and satisfactory, otherwise the time of execution must stand as written.

Refused. Exception by plaintiff.

II.

However, in view of certain undisputed facts, the question whether the paper was actually executed on Sunday becomes immaterial. The defendants admit that they approved or intended to approve by their endorsement and signature all and singular the various sketches, designs, proofs, etc., submitted to them in the course of the year from time to time, excepting only certain small changes which were directed to be made in part of the work. By their letter of September 13th, after receipt of advance shipment, they also
136 indicate that "the work so far is quite satisfactory," and they urge the speedy execution of the balance. This letter is followed by another under date of January 24th, after receipt of a second shipment, and after receipt of an invoice showing prices of the goods shipped, wherein they insist that they shall not be called upon to accept any drafts until the whole order was completed, and promising to remit at once upon arrival of the goods and finding the same to be as ordered.

Now, conceding the original contract or agreement to be void because in contravention of the statute, still by these subsequent acts and writings, and the instructions to modify the work, the defendants will be deemed to have reaffirmed the original order or contract, and they are now estopped from asserting the invalidity thereof on the ground of public policy.

Refused. Exception by plaintiff.

III.

The defendants also complain of certain interlineations or alterations in the written instrument dated March 28, 1890. The evidence of the defendants on this point is by no means clear and free from ambiguity. Whatever alterations or interlineations may appear to have been made, *it must be shown that they were made subsequent to the execution or signing of the paper, and without the knowledge and consent of the defendants*; otherwise such alterations or interlineations will not effect the validity or construction of the

paper itself. Yea, it does not even appear that the dupli-
137 cate or copy that the defendants kept for their own use and future reference was different from this first draft, which is now offered in evidence. On the part of the plaintiff it is insisted that the two papers were precisely alike, except that Fisher's copy was a cleaner writing. The defendant Fisher claims to have no knowledge on the subject.

Refused. Exception by plaintiff.

IV.

From the evidence of Fisher himself it appears that he displayed an almost reckless disregard of all business habits which ought to prevail in dealings of this kind between parties otherwise on an equal footing. Mr. Fisher is shown by the evidence to be neither blind, illiterate, or inexperienced in business matters. He informs us that he merely glanced the paper over before signing it; he admits to have taken a copy, a duplicate, for the purpose of future reference, which he placed in his desk, whence it was taken out about a month later and read over on the occasion of the first submission of sketches and designs by Mr. Smith. No objection to its terms or language appears to have been made by him on either occasion; even later on, in his letter of February 26th, 1891—after arrival of all the work at Salt Lake City—he refers to this agreement of March 28, and the orders then given, and while complaining of exorbitant prices and large quantities, he nowhere intimates (even at this late date) that he did not know the wording or language of the agreement thus by him signed. Upon these
138 undisputed facts the court instructs you that if Fisher really did neglect to read the paper which he signed, and thus remained ignorant of its terms, he cannot now complain, because he would appear, by his own admissions, to be a victim of his own folly.

Refused. Exception by plaintiff.

VI.

The defendants have utterly failed in proving their allegations set up by way of amendment of their answer; they have not laid by their evidence any foundation in law for holding this written instrument to be void or voidable on the ground of misrepresentation regarding the value of the work proposed to be furnished.

Refused. Exception by plaintiff.

VII.

The defendants cannot be permitted to deny the legal effect of the written instrument which they signed, and the defense of fraud cannot be maintained by evidence which merely tends to show that it was represented or agreed at the time the paper would only subserve the purposes of a price-list, memorandum, or the like, from which the defendants might make their selection and give future orders at their pleasure.

Refused. Exception by plaintiff.

VIII.

One of the most ordinary methods of concluding a contract is by making a written proposal on the one side, accepted by the other; that is, if one makes to another an offer, verbal or written, of a sort implying nothing to be done except to assent or decline,
139 and the latter accepts it, adding no qualification, there is thus constituted a mutual consent to the same thing at the same time—in other words, a contract—and the question of the sufficiency of the transaction to work this result is of law for the court.

The United States court of appeals in a late case has decided that a written proposal, substantially like the one here in evidence, when bearing words "approved" and the signature of the defendant, constitutes a valid and subsisting contract, which—when followed up by substantial approval of the designs, sketches, plates, etc.—authorize the lithographer, without any further orders or instructions whatsoever, to execute the work, and to collect on delivery their pay therefor. This court instructs you on the evidence and writings in this case to the same effect.

Refused. Exception by plaintiff.

IX.

The defendants admit in their answer that after approval of sketches, they did order a certain limited quantity of stationery and other articles *at prices* to be paid by them, *as agreed upon at the time the order was made;* and that it was then and there agreed that defendants would accept and pay for—

1½ million labels at 55 cts. per 1,000.
250 views of Salt Lake City at 80 cts. each.
300 bock-beer cards at 37½ cts. each.
1 check book containing 1,000 checks, at $14.75.
5,000 advertising cards at —.

140 They aver that these were the only articles they ordered or bought; but it appears from their own evidence that Mr. Williams, upon instructions received from Mr. Fisher, gave an order for additional stationery, viz:

10,000 letter-heads.
10,000 note-heads.
10,000 statements.
10,000 bill-heads.
10,000 business cards,

as early as April, 1890. (See his answer to direct interrogatory 6.) The contract price of the labels is admitted to be 55 cents; bock-beer cards, 37½ cents (Williams' answer to interrogatory No. 7); advertising cards —; 1,000 checks $14.75.

As to the other stationery, it is now insisted by Fisher that no price was fixed, and that the prices as charged were exorbitant. It will, however, be borne in mind that in his answer he distinctly alleges the prices to be paid were agreed upon at the time the order was made, and also, that to the price of $14.75 for a thousand checks, involving substantially the same kind of

work, no objection appears to have been made. The jury will also consider in this connection that when the advance shipment of December 15th was made the price of stationery was stated in invoice or letter of advice throughout at $14.75, and that to this charge no objection was made for a long while; on the contrary, the defendants write under date of January 24th: 'Whenever you see fit to complete our order, ship and invoice properly; upon ar-
141 rival of goods and same found to be as ordered, we shall be pleased to remit you at once.'

In the absence of clear explanatory evidence, these various facts ought to conclude the defendants from now assuming another or different position; they tend to show that the price of that stationery is not now left open to conjecture, but is alike with that fixed for the check book.

Refused. Exception by plaintiff.

X.

In view of the fact that Mr. Williams concedes an order for 10,000 each of five different kinds of stationery—in fact, for all that the original proposal covers, except the small letter-heads and envelopes—it does not now lie in the mouths of the defendants or their counsel to complain of the exorbitant quantities, lasting them for twenty-five years or more; the order thus given entirely disposes of all controversy on this point.

Refused. Exception by plaintiff.

XI.

Even if it be true that the original proposal or agreement were not binding upon the defendants, on ground of public policy, misrepresentations, or subsequent alteration, still the plaintiff would be entitled to recover for the work and articles actually delivered, because the defendants are shown by their endorsements of July, October, and December, which appear on the backs of the final proofs, to have affirmed and reiterated the original agreement, and
142 to have given further directions as to the execution and delivery of the work.

Refused. Exception by plaintiff.

XVI.

In every case where a charge of fraud, subsequent alteration, forgery, or the like is made, as here, a presumption of honesty must be overcome, and stronger evidence will accordingly be required then would be necessary in a case in which no such presumption existed.

Refused. Exception by plaintiff.

XVII.

Parties to a litigation will not in general be permitted, especially in a case like this, to oscillate in their defenses or depart from the ground first taken. The jury may properly take into consider-

ation the correspondence, especially the letter of February 26th, and the answer in the case and amendment thereto, both of which were verified by Fisher, as well as other testimony deemed material; they may inquire whether the statements and allegations made by the defendants at various times can be harmonized with the testimony given by Fisher when a witness in his own behalf; and if the jury become convinced from the evidence that Fisher is oscillating in his version of this transaction and in his statements as to the real understanding and agreement between the parties, then this issue of fraud and misrepresentation must be found in favor of the plaintiff.

Refused. Exception by plaintiff.

143 XVIII.

When a party gives a reason for his conduct touching anything involved in a controversy he is estopped after suit is brought to change his ground. In view of this rule of law, as laid down by the United States Supreme Court, it becomes the duty of this jury to scrutinize closely the statements and reasons given by the defendants in their letter of February 26th and see whether they can be possibly harmonized with their position as now assumed upon the record by way of answer and testimony. If found conflicting, there is certainly just cause for suspicion.

Refused. Exception by plaintiff.

XIX.

The various pleas of fraud set up by way of answer and amendment thereto are not substantiated by the evidence.

Refused. Exception by plaintiff.

XX.

The defendants cannot be permitted to defend on the ground of fraud, thus repudiating the written contract of March 28, 1890, while at the same time retaining the fruits of it. The answer in this case is not accompanied by a tender or offer to return the property which has come to the hands and possession of the defendants, nor does it anywhere appear from the answer or the proofs that there is a continuous readiness or willingness to return said property or any part of the same, and it would not be just that
141 the defendants be permitted to retain any part of this work without paying therefor.

Refused. Exception by plaintiff.

The above instructions, all and singular, were, however, refused; to which ruling thus to instruct or to give the substance of the instructions asked the plaintiff then and there excepted, as above particularly noted in the record."

14th. The court erred in its charge to the jury at folios 232, 233, 234, and 241, as particularly noted in the bill of exceptions (Abst.,

pp. 121, 122, 124). The portions of the court's charge to the jury objected to by the plaintiff are underscored and shown by the printed abstract in italics as follows:

GENTLEMEN OF THE JURY: This action is brought to recover the contract price of views of Salt Lake City, stationery, and advertising material; also damages for a refusal to take bottle labels stated in the complaint. The paper set out in the complaint and in evidence before you, with the alleged approvals and delivery of the articles, the plaintiff relies upon as his cause of action, and if you believe from a preponderance of the evidence that the same was executed *in good faith* and complied with by the plaintiff and delivery was duly made to the defendants, you should find for the plaintiff.

(The plaintiff excepted to the interpolation of the words "in good faith.")

The court further charges you that if you believe from the
145 evidence that the words "all terms and conditions included in above read and agreed" were written above defendant's signature to the contract after the defendant signed it and without his consent, that such insertion invalidated the contract, *and the plaintiff cannot recover unless the evidence shows that the defendant, after he knew of such insertion, accepted the articles in pursuance of the contract.*

(To the latter part of which proposition, underscored as above, plaintiff excepted.)

And the same rule would apply to words written over the signature of the defendant after he placed it on the views, stationery and advertising matter; if so written without the defendant's consent, such language should receive and be given no force or effect.

If the representations in the amended answer were made as therein set out, and were false, and were within the knowledge of the plaintiff's agents when they made it, and they were relied upon by the defendant, and the defendant was ignorant of the prices as therein stated, as alleged in the answer, the defendant has a right to avoid the contract, unless the evidence shows that after knowing they were false he accepted the articles according to the contract.

(To which charge, as above underscored, plaintiff duly excepted.)

The court further charges you that if the contract sued on was made on Sunday, it is invalid unless the defendant agreed to comply with it, and afterwards accepted the goods from the plaintiff in pursuance of it.

146 If the words were inserted without the consent of the defendant or the false representations were made as alleged, or the contract was made on Sunday, the defendant after knowing of the same afterwards consented to carry out the contract and receive the goods or articles, it would be binding.

And the court further charges you that if the defendant had reasonable time and a reasonable opportunity to examine the articles after they reached him, and if found contrary to the contract or not included in it, a reasonable time to notify the plaintiff of his refusal

to accept, and offer to return such articles, the defendant was bound to act in good faith and with reasonable diligence.

In finding the compensation, value, and prices, you should find the customary compensation, values, and prices, such as persons or houses usually give or take for such articles.

The burden is on the plaintiff to prove the contract and to explain interlineations, and show a compliance of the contract and offer to comply on its part. The burden is upon the defendants to prove false representations and allegations of fraud. Fraud is never presumed. It must be proved by the party alleging it by a preponderance of the evidence. If you find a valid contract to deliver and accept bottle labels, as stated in the plaintiff's complaint, and that the plaintiff was ready and willing to comply, and that the defendant notified the plaintiff that he would accept them,
147 you should allow as damages to the plaintiff for such refusal the difference between the contract price and the cost of production.

If you find a conflict in the testimony, you should reconcile it if you can, upon any reasonable hypothesis. If you cannot, you must determine what you will believe. You are the judges of the credibility of the witnesses who have testified before you, and in judging of their credibility you have a right to take into consideration their deportment upon the witness stand, the interest that they may have in the result of the suit, as it appears from the evidence; their motives to speak truly or falsely, so far as it appears from the evidence; the fact that their statements may be reasonable or unreasonable in the light of the evidence; their apparent frankness or candor or the want of it; their opportunities to understand and know that to which they testify and their capacity to remember; in fact, you have a right to take into consideration any fact in evidence which in your judgment affects the credibility of any witness.

It is your duty to weigh the evidence, and in doing so you should consider it altogether. You should not pick out any particular fact or any particular statement of any witness and give it undue weight. You should consider it all together and give to the testimony of each witness just such weight as you think it is entitled to.

You should give such weight to inferences from the facts as you think they are entitled to. You should consider the evidence
148 impartially and fairly. You are the judges of the fact.

If you find the issues for the plaintiff, you will be governed by the prices in the written contract, so far as the prices are fixed in it; and as to such as are not, you will allow the prices agreed upon, if you find from the evidence that any such prices were agreed upon afterwards; and if not, then the customary compensation or price; and you will allow eight per cent. per annum on the amount you find, from the time of the delivery of the goods, of such as were delivered; and those to be delivered in the future, and refused by the defendant, the difference between the contract price and the cost of production; and you will state in your verdict the amount that you so find.

If you find for the defendant you will state in your verdict, "We, the jury, find the issues for the defendant."

"*The court further charges you that the concurrence of nine or more members of the jury is essential to your verdict, and that all who agree to it should sign it.*"

(To which last charge the plaintiff duly excepted.)

15th. The court erred at folio 242 in receiving and causing to be entered on the record what purported to be a verdict of the jury (Abst., pp. 124, '5). The action of the court excepted to by plaintiff is as follows:

"The jury, having retired and deliberated, returned a written verdict into court on the 12th day of December, 1892, 'finding
149 the issues for the defendant,' signed by nine of its mem' bers, the others refusing to concur therein; which verdict the court then and there received and caused to be entered upon the record."

To which action of the court the plaintiff excepted.

And the plaintiff further says that in the record and proceedings aforesaid there was also manifest error in awarding judgment and overruling the plaintiff's motion for a new trial by reason of the several errors and exceptions above noted and because the evidence is insufficient to justify the verdict, in that—

1st. The defendants have utterly failed in making good their pretended plea of fraud or false representations, as set up by way of original answer.

2nd. The evidence utterly fails to support or substantiate the pretended fraud and plea of false representations set up by way of amendment to the answer.

3rd. The evidence does not support the pretended plea of invalidity of the contract because entered into on Sunday.

4th. The evidence fails to show any offer to return any of the lithographic work which is said not to have been ordered.

5th. The evidence does not disclose any tender or offer to pay for any part of the work received by the defendants and retained by them.

6th. For all that appears on part of the defendants, the plaintiff was entitled to a verdict, as prayed for by the complaint, on the undisputed evidence.

150 7th. The finding of the jury is not supported by any preponderance of the evidence.

8th. The verdict is contrary to the law and evidence.

To all of which rulings the plaintiff duly excepted.

All of which is repsectfully submitted.

DEY AND STREET,
Attorneys for Plaintiff.

F. W. VON COTZHAUSEN, *As Counsel.*

150½ [Endorsed:] Supreme court of the Territory of Utah. The American Publishing Company *vs.* A. Fisher *et al.* Assignment of errors. Filed Jul- 26, 1894. Jos. P. Bache, clerk supreme court Utah.

151 Copy.

Know all men by these presents that we, American Publishing Co. (a corporation), as principal, and Lewis S. Hills and J. T. Little, as sureties, are held and firmly bound unto A. Fisher and Aaron Keyser, copartners, doing business under the firm name of A. Fisher Brewing Co., in the full and just sum of eight hundred and no $_{100}$ (800) dollars, to be paid to the said A. Fisher and Aaron Keyser, copartners, doing business under the firm name of A. Fisher Brewing Co., their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of August, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a session of the supreme court of Utah Territory, in a suit depending in said court between American Publishing Co., a corporation, plaintiff in error, and A. Fisher and Aaron Keyser, copartners, doing business under the firm name of A. Fisher Brewing Co., defendants in error, a judgment was rendered against the said American Publishing Co., a corporation, and the said American Publishing Co., a corporation, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said A. Fisher and Aaron Keyser, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 60 days from the date thereof:

Now, the condition of the above obligation is such that if the said American Publishing Co. shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) AMERICAN PUBLISHING CO., [SEAL.]
Per DEY AND STREET, *Its Att'ys.* [SEAL.]
LEWIS S. HILLS. [SEAL.]
J. T. LITTLE.

Sealed and delivered in presence of—
R. C. BADGER.

Approved by—
GEORGE W. BARTCH,
Associate Justice Supreme Court Utah.

Marked: Filed Aug. 14, 1894. Jos. P. Bache, clerk.

152 UNITED STATES OF AMERICA, } ss:
Territory of Utah, }

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly

certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and seal of said supreme court, at Salt Lake City, in said Territory, this 8th day of October, 1894.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Endorsed on cover: Case No. 15,823. Utah Territory supreme court. Term No., 553. The American Publishing Company, plaintiff in error, *vs.* A. Fisher and Aaron Keyser, copartners, doing business under the firm name of A. Fisher Brewing Company. Filed March 11th, 1895.